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(17,040.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 153.

WILLIS THORP, PLAINTIFF IN ERROR,

vs.

S. A. BONNIFIELD ET AL.

TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a United States Circuit Court of Appeals for the Ninth Circuit.

WILLIS THORP, Plaintiff in Error,
vs.
S. A. BONNIFIELD and JOHN G. HEID, Defendants in Error. } No. 289.

Transcript of Record.

In error to the district court of the United States for the district of Alaska.

Filed March 20, 1896.

F. D. MONCKTON, *Clerk.*

1 THE UNITED STATES, *District of Alaska,* } *ss:*

Pleas and proceedings began and held in the district court of the United States for the district of Alaska, at the November term, 1895.

Present: The Honorable Arthur K. Delaney, judge.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

On April 15, 1895, the plaintiffs filed their complaint in said cause; which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.

For complaint in the above-entitled action the plaintiff complains and alleges:

That on the 25th day of April, 1895, William M. Bennett, for himself and as the administrator of the estate of Michael Gibbons, deceased, leased and let for the term of two years to one Al Runkle those certain mining premises situate in Silver Bow basin, Harris mining district, Alaska, known as the Aurora Lode claim, U. S. survey, lot No. 41, and in consideration thereof the said
2 Runkle agreed to pay the said Bennett the sum of $500 on or before June 1st, 1894, unless the weather prevented the operating of the quartz mill, and in that event as soon as the ore from the mine could be taken to the mill; $900, payable 30 days after the payment of said $500; $2,300 on or before August 15th, 1894, and $500 in the month of October, 1894, said sums to be used in payment of a certain mortgage on said premises held by Robert Duncan, Jr., and J. Parker Corbus.

That afterwards, to wit, on the 5th day of May, 1894, by mutual agreement between said Bennett and Runkle, S. A. Bonnifield, one of the plaintiffs herein, became a party to said lease, and by consent of said Bennett and Runkle his name was inserted in and added to said lease, and he then and there became one of the lessors of said premises, a copy of which lease, with the agreement for said Bonnifield to become one of the lessors, is hereto annexed, marked "Exhibit A," and made a part of this complaint.

That on the 7th day of May, 1894, the said Al Runkle and S. A. Bonnifield sold, transferred, and assigned for a good and valuable consideration an undivided one-eighth ($\frac{1}{8}$) interest in and to the lease of said Aurora Lode claim, with the consent of said Bennett, to John G. Heid, one of the plaintiffs herein, a copy of which assignment, with the consent thereto, is hereto attached and made a part of this complaint and marked "Exhibit B."

That on or about the 1st day of June, 1894, the said Al Runkle sold, transferred, and assigned unto S. A. Bonnifield, one of the plaintiffs herein, his interest in the lease of said premises and all his right, title, and interest thereto up to and until the 31st day of December, 1894, for a good and valuable consideration and subject to the conditions in said lease, a copy of which assignment is
3 hereto annexed, marked "Exhibit C," and made a part of this complaint.

That afterwards, to wit, on the 26th day of June, 1894, the said S. A. Bonnifield and John G. Heid, with the consent of said William M. Bennett, entered into an agreement and did agree with Willis Thorp, the defendant herein, by which it was agreed by and between said parties that in consideration of said Bonnifield and Heid assigning all their right, title, and interest in and to the lease of said premises and the possession thereof up to and until the 31st day of December, 1894, to said defendant, Thorp, subject to the rents, payments, conditions, and covenants contained in the original lease from said Bennett to said Runkle and Bonnifield and the payment of the mortgage on said premises held by Robert Duncan, Jr., and J. Parker Corbus, which the payments set forth in the original lease were intended to cancel, a copy of which assignment is hereto attached, marked "Exhibit D," and made a part of this complaint, the said Thorp did agree with said Bonnifield and Heid to pay said mortgage, to wit, the sum of $3,686.59, and to assume and pay all and every claim standing against or on account of said premises contracted by said Bonnifield and Runkle at the date thereof.

That the said defendant, Thorp, further agreed to mine, work, and operate said premises, and after making all the payments in said lease mentioned, to wit, the amount of said mortgage and debts contracted on account of said premises, was to retain for himself seven-sixteenths ($\frac{7}{16}$) parts of the profits or net proceeds arising from the operation of said mine and premises and to pay to these plaintiffs, S. A. Bonnifield and John G. Heid, the remaining nine-sixteenths ($\frac{9}{16}$) parts of the profits or net proceeds
4 arising from said operation of said mine and premises in the proportion of $\frac{7}{16}$ to Bonnifield and $\frac{2}{16}$ to Heid.

That under and in accordance with said agreement and assignment of said lease the said Willis Thorp entered into the possession of said premises, and worked, mined, and operated the same up to and until the 31st day of December, 1894, extracting and taking out therefrom gold to the value and amount of $32,000.00, and ore and concentrates to the amount and value of $3,500.00, of which he disposed and sold the same.

That the cost and expense of working, mining, operating, and extracting said gold and ore from said premises was $23,000.00, leaving a balance of profits or net proceeds of $12,500.00, of which the said Bonnifield and Heid were entitled to $\frac{9}{16}$ thereof.

That under said assignment and as a part of the expenses incurred in connection with said premises was the sum of $200 advanced and paid by the said Bonnifield and not repaid him from the earnings of said mine.

That the said defendant, Thorp, has failed and refused to pay said sums or any part thereof, although often demanded.

Wherefore plaintiffs demand judgment against said defendant in the sum of $7,231.25 and costs of action.

JOHNSON & HEID AND
J. F. MALONY,
Att'ys for Plaintiffs.

UNITED STATES, }
Dist. of Alaska, } ss:

S. A. Bonnifield, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 10th day of April, 1895.

[L. S.] J. F. MALONY,
Notary Public.

"EXHIBIT A."

For and in consideration of the sum of one hundred dollars to me in hand paid by Al Runkle and S. A. Bonnifield, the receipt whereof is hereby acknowledged and in further consideration of the payment of the sums of money hereafter to be made to me by said Al Runkle and S. A. Bonnifield, to wit: $500.00 on or before June 1st, 1894, unless the weather prevents starting up the quartz mill to be operated for the treatment of the ores of said Aurora Lode claim, then the said sum of $500.00 shall be payable to me as soon as the ore from said Aurora lode can be taken to the said quartz mill; $900.00 thirty days after the payment of the said sum of $500.00; $2,300.00 on or before August 15th, 1894, and $500.00 in the month of October 1894. I, William M. Bennett, for myself and as administrator of the estate of M. H. Gibbons, deceased, do hereby grant, demise and let unto said Al Runkle and S. A. Bonnifield all the following-described mine and mining property, situate

in Silver Bow basin, Harris mining district, Alaska, to wit: the Aurora Lode mining claim, U. S. survey lot No. 41, together with all and singular the lodes, veins and deposits within the lines of said claim, and all mines, mineral dumps, plant, fixtures, machinery, tramways, improvements, water rights, privileges and appurtenances thereunto in anywise belonging, excepting the "Huntington quartz mill," now situated upon said Aurora Lode claim; with authority to mine and work said Aurora Lode claim as he sees fit, for the term of two years from the date hereof, provided only such work be done in good workmanlike manner, and all ore taken out shall be at the disposal of said Runkel and Bonnifield as he sees fit.

If default shall be made by said Runkel and said Bonnifield in the payment of any of the above-mentioned sums of money,
7 within the time or times hereby limited therefor, all previous installments or sums of money paid hereunder shall be and remain the property of said Bennett and said estate of M. H. Gibbons, deceased, and this lease and contract shall be ended, determined and void.

At any time within two years from date hereof, the said William M. Bennett, for himself and as administrator of the estate of said M. H. Gibbons, deceased, on tender to him by said Runkle and said Bonnifield of the further sum of $35,700.00, agrees to convey by good and sufficient deed to said Al Runkle and Bonnifield, his heirs and assigns, the above and hereinbefore described premises. Said sum of $35,700.00, if not paid before April 25th, 1895, shall bear interest at the rate of 8 per cent. per annum, which interest shall be payable monthly, and the said sum of $35,700.00 is payable on or before April 25th, 1896.

In case the said Al Runkle and Bonnifield shall pay said sum of $35,700.00 or any part thereof before April 25th, 1895, then and in that case the said Runkle and Bonnifield shall be authorized to deduct eight per cent. on all sum or sums paid before said date, as anticipated payments.

This said lease and contract is subject to the conditions of a certain "bond for mining deed" executed by said Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased, to Robert Duncan, Jr. and J. Parker Corbus, on the 9th day of September, 1892, which said bond provides for the payment of $50,000.00 for said Aurora Lode claim, and in case the said R. Duncan, Jr. and J. Parker Corbus, before the expiration of said bond, shall tender to said Bennett and pay to him the said full sum of $50,000.00,
then and in that case the said Al Runkle and said Bonni-
8 field shall receive the sum of $10,000.00, together with a repayment of all sum or sums of money paid to said Bennett hereunder.

Nothing herein contained shall be construed to authorize the said Al Runkle and said Bonnifield to sublet the premises herein described, nor permit any other person or persons to occupy, possess, work or improve the same, without the written consent of the said Bennett, first thereto obtained; but nothing herein contained shall prevent the said Al Runkle and said Bonnifield from selling said

premises, provided the said several sums of money hereinbefore mentioned are paid to said Bennett at the time of such sale.

The said Bennett for himself and as the administrator of the estate of M. H. Gibbons, deceased, expressly reserves to himself any and all claims which he may have for himself and as administrator of said estate, against any and all persons for damages done to said Aurora Lode claim and surface ground and reserves to himself the right to sue any and all persons in order to recover such said damages.

This lease and contract shall further be subject to a certain lease made by and between said Bennett and as administrator, John G. Heid, lessors, and Archibald Campbell lessee, on the 1st day of May, 1890.

In the case the said Huntington quartz mill, hereinbefore mentioned shall be in the way or interfere with the construction of any improvements, contemplated to be erected or constructed by the said Runkle and Bonnifield then and in that case the said Runkle and Bonnifield, at their own cost and expense, shall be authorized to remove the said Huntington quartz mill, using due care in the removal of said mill. All improvements such as buildings, machinery, tramways and other fixtures made or constructed on said premises, shall be and remain the property of said Bennett and said estate, in case this lease and contract is ended, determined or forfeited. It is further agreed between the parties hereto, that so much of the several sums of money (as may be necessary) to wit: $500.00, $900.00 and $2,300.00, hereinbefore mentioned to be paid to said Bennett and said estate, by said Runkle and Bonnifield shall be applied by said Bennett in the payment of a certain promissory note secured by a mortgage on said described premises, executed by said Bennett to R. Duncan Jr. and said J. P. Corbus, dated September 9th, 1892.

In witness whereof, the parties hereto have hereunto set their hands and seals, this 25th day of April, 1894.

W. M. BENNETT. [SEAL.]
W. M. BENNETT,
As Administrator of M. H. Gibbons' Estate.
AL RUNKLE. [SEAL.]
S. A. BONNIFIELD. [SEAL.]

In presence of—

JOHN G. HEID.
D. E. LUTES.

It is hereby mutually agreed and understood by and between the said William M. Bennett, for himself and as administrator of the estate of M. H. Gibbons deceased, the said Al Runkle and said S. A. Bonnifield, that the said S. A. Bonnifield shall be added as a party to the foregoing contract and agreement, but that the addition of the said Bonnifield to said contract and agreement shall in

no way have the effect to alter or change any of the terms and conditions therein set forth.

Juneau, Alaska, May 5th, 1894.

WILLIAM M. BENNETT,
For Himself and as Administrator of the Estate of M. H. Gibbons, Dec.
AL RUNKLE.
S. A. BONNIFIELD.

10 "EXHIBIT B."

Whereas, a certain "working contract sale agreement" dated the 25th day of April 1894, was entered into by William M. Bennett for himself and as administrator of the estate of M. H. Gibbons, deceased, of the one part, and Al Runkle and S. A. Bonnifield of the other part, which said agreement granted to said Runkle and Bonnifield the right and privilege to work and mine the Aurora lode, situated in Silver Bow basin, Harris mining district, Alaska, U. S. survey lot No. 41, as they may see fit and further providing for the sale of said Aurora Lode claim to said Runkle and said Bonnifield, upon the terms and conditions therein set forth as it will more fully appear in a copy of said "working contract sale" agreement hereto annexed and made a part of this assignment.

Now know all men by these presents, that we, Al Runkle and S. A. Bonnifield, for and in consideration of the sum of one dollar, lawful money of the United States, to us in hand paid, the receipt whereof is hereby acknowledged, do by these presents grant, sell, transfer and set over unto John G. Heid of the town of Juneau, in the district of Alaska, his executors, administrators heirs and assignes forever an undivided one-eight- ($\frac{1}{8}$) part or interest of in and to said "working contract sale" agreement hereunto annexed.

To have and to hold the said undivided one-eight- ($\frac{1}{8}$) part or interest in and to said agreement, with all the benefit, profit, and advantage thereof, unto the said John G. Heid, his heirs, executors, administrators and assigns, in as full, ample and beneficial manner to all intents and purposes, as we the said Al Runkle and S. A. Bonnifield, by virtue of said agreement, may or might have or hold the same, if this transfer or grant had not been made.

11 It is further understood that the said Heid shall not be entitled to any dividend or share of the output of said Aurora Lode claim to be worked, mined and operated by the said Runkle and said Bonnifield, until the first four payments in said agreement mentioned together with the costs and expenses of operating and working of said Aurora lode have been fully paid at the date when the four said payments mentioned in said agreement are paid by said Runkle and said Bonnifield; and it is also further understood that, the said John G. Heid shall not be called upon to defray any part of the expenses of operating and working the said Aurora lode, nor shall he be required to pay any part of the said sums of

money constituting the said four payments first mentioned in said agreement.

Juneau, Alaska, May 7th, 1894.

AL RUNKLE.
S. A. BONNIFIELD.

I hereby consent to the above transfer to J. G. Heid above mentioned.

W. M. BENNETT.

Juneau, Alaska, May 7th, 1894.

12 "EXHIBIT C."

For value received, I do by these presents bargain, sell, assign and set over unto S. A. Bonnifield, his heirs and assigns, the within indenture of lease, and all my estate, right, title, interest, claim, property and demand of, in and to the lands, tenements, hereditaments and premises therein mentioned, which I now have, by means of the said indenture or otherwise for and during the term ending, December 31st, 1894, subject nevertheless to the rents, conditions and covenants in said indenture contained. At the expiration of the term therein mentioned, to wit, on the 1st day of January, 1895, the said within indenture of lease shall revive as to me and my rights therein, until the expiration thereof, to wit, the 25th day of April, 1896.

AL RUNKLE.

Witness:
F. W. HEYDE.
JOHN G. HEID.

13 "EXHIBIT D."

Whereas a restraining or injunction order has been issued out of the district court of the United States for the district of Alaska in favor of the plaintiffs, in the case of Robert Duncan, Jr., and J. Parker Corbus, plaintiffs and mortgagees and against William M. Bennett, mortgagor, for himself and as administrator of the estate of Michael Gibbons, deceased, Al Runkle and S. A. Bonnifield, defendants, restraining and enjoining said defendants from mining, taking out and removing ore oil of and from the Aurora Lode claim, situate in Silver Bow basin, Harris mining district, Alaska, and whereas Willis Thorp of the town of Juneau, Alaska, has satisfied the claim of said plaintiffs, at the request of said defendants and thereby has caused said injunction order to be vacated;

Therefore in consideration of said Willis Thorp paying and satisfying said claim of plaintiffs in said case or suit, I, S. A. Bonnifield and I, John G. Heid, do by these presents bargain, sell, assings, and set over unto said Willis Thorp, his heirs and assigns, the within and annexed indenture of lease and all our estate, right, title, interest, claim, property and demand of in and to the lands, tenements, hereditaments and premises therein mentioned, which we now have by means of said indenture or otherwise, for the term

ending December 31st, 1894, that is to say the said Thorp shall be the absolute assignee of the within and annexed lease for the term up to and ending December 31st, 1894; subject nevertheless to the rents, payments, conditions and covenants in the said indenture of lease contained, and subject to the further condition and stipulation to wit: that the said Thorp shall during said term, be entitled to and receive and retain to and for himself, after making all
14 payments in said lease mentioned, seven-sixteenths ($\frac{7}{16}$) parts of the profits or net proceeds derived by him from the operating of said Aurora lode or mine, in the working or mining the same and milling the ores extracted and mined therefrom, the other nine-sixteenths ($\frac{9}{16}$) parts of the net proceeds or profits derived by said Thorp, during the said term, from the operating of the said mine and milling the ores therefrom the said Thorp shall pay over to said S. A. Bonnifield and said John G. Heid, or their joint order.

At the expiration of said term, to wit, the 1st day of January, 1895, the said Thorp shall quit and deliver up the possession of said Aurora lode or mine and premises to said S. A. Bonnifield and John G. Heid, or their agent or attorney, peaceably and quietly, in good order and condition, with all the appurtenances and improvements. The said Thorp shall assume and pay all and every claim now standing against the said Aurora Lode claim by reason of the working and mining of the same by said S. A. Bonnifield and Al Runkle, which said claims shall be paid by said Thorp, in addition to the payments in said lease mentioned.

In testimony whereof we have hereunto set our hands and seal this 26th day of June, 1894.

S. A. BONNIFIELD. [SEAL.]
JOHN G. HEID. [SEAL.]

(Endorsed:) No. 439. U. S. district court for the district of Alaska. S. A. Bonnifield and John G. Heid, plaintiffs, *vs.* Willis Thorp, defendant. Service of the within complaint is hereby admitted this 15th day of April, A. D. 1895. Bostwick & Crews, attorneys for defendant. Filed Apr. 15, 1895. Charles D. Rogers, clerk. Johnson & Heid and John F. Malony, attorneys for pl'ffs.

15 And afterwards, to wit, on said date, a summons was issued, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska

S. A. BONNIFIELD and JOHN G. HEID *vs.* WILLIS THORP. } No. 439. Summons.

The President of the United States of America to Willis Thorp, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the

complaint filed against you in the above-entitled action within 20 days from the date of the service of this summons upon you, and if you fail so to appear and answer for want thereof the plaintiff will take judgment against you for $7,231.25.

And this is to command you, the marshal of said district or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Warren Truitt, judge of said district court, and the seal of said court affixed, at Sitka, in said district, this 15th day of April, 1895.

[L. S.] CHARLES D. ROGERS, *Clerk.*

JOHNSON AND HEID AND
JOHN F. MALONY,
Pl'ffs' Att'ys.

(Endorsed:) No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Summons. Returned and filed April 27, 1895. Charles D. Rogers, clerk.

16 *Marshal's Return to Summons.*

UNITED STATES,
District of Alaska, } ss:

I hereby certify that I received the within summons on the 16 day of April, and that on the 16 day of April, 1895, I served the same by delivering a true copy hereof to the within-named Willis Thorp personally in Juneau, district of Alaska.

LOUIS L. WILLIAMS,
U. S. Marshal,
By WILLIAM M. HALE, *Deputy.*

17 And afterwards, to wit, on the 4th day of May, 1895, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN H. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Notice of Appearance.

You and each of you will please take notice that the undersigned have been retained and employed by the defendant, Willis Thorp, in the foregoing-entitled cause.

You will further please take notice that the defendant, Willis Thorp, hereby enters his appearance in the foregoing-entitled cause by and through his attorneys, Messrs. Bostwick and Crews, and all

papers for service upon the defendant in said cause may be served on the undersigned at their office, at Juneau, Alaska.

To the above-named plaintiffs, S. A. Bonnifield and John G. Heid, and to their attorney, J. F. Malony.

Dated Juneau, Alaska, May 4th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant, Juneau, Alaska.

Due and personal service of a true copy of the foregoing motion is hereby admitted this 4 day of May, A. D. 1895.

J. F. MALONY AND
JOHNSON & HEID,
Attorneys for Plaintiffs.

18 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of appearance. Bostwick & Crews, attorneys for defendant. Filed May 4, 1895. Charles D. Rogers, clerk.

And afterwards, to wit, on said 4th day of May, 1895, the defendant filed the following notice of motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice of Motion.

Please take notice that the defendant, Willis Thorp, will on the 20th day of May, 1895, at the court-house, in the city of Juneau, Alaska, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard or at such other time as the court may direct, bring on for hearing before Honorable Warren Truitt, judge of the above-entitled court, the motion heretofore served and filed by the defendant in this cause, requiring plaintiffs to make their complaint in the foregoing-entitled cause more definite and certain in the following particulars, to wit:

By stating the amount of the mortgage which plaintiffs allege that the defendant Thorp agreed to pay, in line four (4), on page (2), of said complaint.

19 To J. F. Malony, attorney for plaintiffs, Juneau, Alaska.

Dated Juneau, Alaska, May 4th, A. D. 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

Due and personal service of a true copy of the foregoing notice of motion is hereby admitted this 4 day of May, A. D. 1895.

J. F. MALONY AND
JOHNSON & HEID,
Attorneys for Plaintiffs.

(Endorsed:) Original, No. 439. In the district court of United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of motion. Bostwick & Crews, att'ys for def't. Filed May 4, 1895. Charles D. Rogers, clerk.

And afterwards, to wit, on said 4th day of May, 1895, the defendant filed the following motion, which is in words and figures following, to wit:

In the District Court of United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Motion for Order Requiring Plaintiffs to Make Complaint More Definite and Certain.

Comes now the defendant, Willis Thorp, by and through his attorneys, Messrs. Bostwick and Crews, and moves the court for an order requiring the plaintiffs herein to make their complaint more definite and certain in the following particulars, to wit:

By stating and inserting in line four (4), on page two (2),
20 of said complaint, the amount of the mortgage which plaintiffs allege that the defendant promised and agreed to pay.

This motion is based upon the plaintiffs' complaint heretofore served and filed in this cause, and the defendant will upon the presentation of said motion refer to said complaint.

Dated Juneau, Alaska, May 4, A. D. 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

Due and personal service of a true copy of the foregoing motion is hereby admitted this 4 day of May, A. D. 1895.

J. F. MALONY &
JOHNSON & HEID,
Of Counsel for Plaintiffs.

(Endorsed:) Original, No. 439. In the district court of United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Motion. Bostwick & Crews, att'ys for def't. Filed May 4, 1895. Charles D. Rogers, clerk.

And afterwards, to wit, on the 18th day of May, 1895, the following further proceedings were had and appear of record in said cause, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Order.

In this action the motion of defendant coming on regularly to be heard for an order making plaintiffs' complaint more definite

21 and certain by inserting the amount of the mortgage which it alleges that the defendant Thorp agreed to pay, in line four, on page two, of said complaint;

And the court, having listened to argument of counsel and being fully advised in the premises, now grants said motion.

Wherefore it is hereby ordered that the plaintiffs insert in the original complaint the amount of the mortgage which they allege that the defendant Thorp agreed to pay.

And it is hereby further ordered that the defendant Thorp have five (5) days in which to file a demurrer to the plaintiffs' complaint, or in case he does not file a demurrer ten (10) days in which to file his answer.

And afterwards, to wit, on the 23 day of May, 1895, the defendant filed a demurrer to plaintiffs' complaint, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Demurrer.

Comes now the defendant, Willis Thorp, by and through his attorneys, Messrs. Bostwick and Crews, and demurs to the plaintiffs' complaint, now on file in this action, upon the following grounds, to wit:

That the said complaint does not state facts sufficient to constitute a cause of action.

BOSTWICK & CREWS,

22 *Attorneys for Defendant.*

Juneau, Alaska, May 23rd, 1895.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Demurrer. Filed May 23, 1895. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska. Copy of within demurrer received and due service of the same acknowledged this 23rd day of May, 1895. J. F. Malony & Johnson & Heid, attorneys for plaintiffs.

And afterwards, to wit, on the 3d day of December, 1895, the following further proceedings were had and appear of record in said cause to wit:

S. A. BONNIFIELD ET AL. *vs.* WILLIS THORP. } No. 439.

Come now the parties hereto, by their respective attorneys, and defendant's demurrer to plaintiffs' complaint coming on to be heard,

and the court, being sufficiently advised in the premises, overrules said demurrer; to which ruling of the court the counsel for the defendant excepts, and defendant is given until Monday, December 23, 1895, to file his answer to said complaint.

And afterwards, to wit, on the 26th day of December, 1895, the plaintiffs filed a motion for judgment, which is in the words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.

23 Come now the plaintiffs in the above-entitled action, by Johnson & Heid, their attorneys, and move the court for judgment for want of answer for the reason that it appears from the record in this action that the defendant had been duly served with summons and has failed to answer the complaint of plaintiffs herein, and that the time for answering the said complaint has expired.

JOHNSON & HEID,
Attorneys for Plaintiffs.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. Bonnifield & Heid *vs.* Willis Thorp. Motion for judgment for want of answer. Filed Dec. 26, 1895. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

And afterwards, to wit, on said 26th day of December, 1895, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

The defendants having been duly served with the summons and complaint and having failed to answer the complaint and the time for answering the complaint having expired and no answer having been filed with the clerk of the court within the time allowed by the court—

Now, on motion of plaintiffs' attorneys in open court, the default of the defendant is hereby entered.

24 And afterwards, to wit, on the 10th day of January, 1896, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

You will please take notice that I do not wish you to longer represent me in the foregoing-entitled cause; that your employment by me in said action is hereby terminated and at an end; that you will from the date of the service of this notice upon you take no other steps for me as my attorney in said cause, and any act or proceeding had or done by you in said cause for or in my behalf from the date of the service of this notice is absolutely unauthorized and void as far as I am concerned.

Juneau, Alaska, November 9th, 1895.

S. A. BONNIFIELD.

To J. F. Malony, Esq., attorney-at-law, Juneau, Alaska.

UNITED STATES, } *ss:*
District of Alaska, }

I hereby certify that I served a true copy of the foregoing notice upon John F. Malony, at Juneau, Alaska, on the 19th day of November, 1895.

Dated Juneau, Alaska, November 20th, 1895.

25 W. C. WATTS,
Deputy United States Marshal for Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of dismissal of John F. Malony by S. A. Bonnifield. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following demand, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

You will please forthwith deliver to the bearer, William C. Watts, all papers, receipts, contracts, and documents of every kind, nature, and description now in your possession and which belong to me and which were by me left with you in the foregoing-entitled cause or any other cause or causes.

Dated Juneau, Alaska, November 13th, 1895.

S. A. BONNIFIELD.

To J. F. Malony, Esq., attorney-at-law, Juneau, Alaska, United States.

26 DISTRICT OF ALASKA, *ss:*

I hereby certify that I served a true copy of the foregoing notice upon John F. Malony, at Juneau, Alaska, on the 19th day of November, 1895.

Dated Juneau, Alaska, November 20th, 1895.

W. C. WATTS,
Deputy United States Marshal for Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Demand of S. A. Bonnifield on John F. Malony for all papers. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following stipulation, which is in words and figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Stipulation.

It is hereby stipulated and agreed that defendant may have until March 1st, 1896, in which to serve and file his answer in the foregoing cause.

Dated December 24th, 1895.

S. A. BONNIFIELD, *Plaintiff.*
BOSTWICK & CREWS,
Attorneys for Defendant.

27 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Stipulation. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendants; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following affidavit; which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Affidavit.

UNITED STATES OF AMERICA, } ss:
For the District of Alaska, }

H. Bostwick, being first duly sworn, upon oath deposes and says as follows: First, that affiant is a member of the firm of Bostwick and Crews, attorneys-*of*-law, at Juneau, Alaska, and that said firm are the attorneys for the defendant in the foregoing-entitled cause. Second, that this foregoing-entitled action was commenced on the 15th day of April, 1895, and summons and complaint was personally served upon the defendant on the 16th day of April, 1895; that the defendant, through his attorneys, Messrs. Bostwick & Crews, served and filed general notice of appearance in said cause on the 4th day of May, 1895. Third, that on the 10th day of June the plaintiffs filed affidavit and bond for an attachment, and that attachment was thereupon issued, and that thereafter and on,
28 to wit, June 17th, said attachment was duly executed by the United States marshal in and for Alaska, and all of the property of the defendant was attached.

That subsequently and on, to wit, July 17th, the defendant executed and caused to be executed a delivery bond to the United States marshal, claiming a redelivery of the property therebefore attached, and that thereupon the said property was released from said writ of attachment and delivered to the defendant herein by the United States marshal.

That thereafter and on, to wit, July 15th, 1895, and order was made in pursuance of due notice by defendant discharging the attachment heretofore issued in this cause upon the due execution by defendant of an undertaking conditioned to pay any judgment obtained against the defendant in this action, and that said undertaking was signed by the defendant, as principal, and by Archie Campbell, B. M. Behrends, C. W. Young, Wm. M. Ebner, Emery Valentine, E. O. Decker, J. M. Decker, and John Olds, as sureties.

That on the 23rd day of May, 1895, the defendant served and filed a demurrer to the plaintiffs' complaint herein on the ground that the facts set forth in plaintiffs' complaint were not sufficient to constitute a cause of action; that on the 3rd day of December, after argument of said demurrer, the same was by the court overruled and the defendant given 20 days in which to file his answer.

Fourth. That the attorneys for defendant labored under the impression that they had sixty days' time in which to file answer in this case for the reason that — the several other cases in which defendant's attorneys were interested sixty days' time had been allowed for answer, and attorneys for defendant did not know that
29 they only had twenty days to answer in this cause until on the morning of the 23rd day of December, 1895; that affiant,

upon examination of his office docket, learned that answer was due on that day; that affiant immediately went to the office of Messrs. Johnson & Heid for the purpose of seeing said attorneys and getting an extension of time in which to file answer for defendant; that said Johnson & Heid nor either of them was in their office when affiant called at 10 o'clock a. m.; that affiant was engaged in his office the balance of said day and did not have an opportunity to see Messrs. Johnson & Heid until the morning of December 24th; that affiant saw Charles Sumner Johnson on Front street at about 10 o'clock in the morning; that said Johnson had a grip in his hand and was going towards the Juneau wharf; that affiant accosted Johnson, saying, Johnson, where are you going? Johnson replied that he was going down to the wharf; that affiant said to Johnson that the time was up for answering in the foregoing-entitled cause, and that the defendant Thorp was out of the Territory, and that affiant wanted a stipulation giving defendant further time to answer; that Johnson replied that affiant had better see Mr. Heid, as he was interested in the case; that soon after affiant prepared a stipulation, and went to the office of Messrs. Johnson & Heid, and then and there stated to Messrs. Johnson & Heid that Mr. Thorp had been unexpectedly called away, and that he was then in North Yakima, State of Washington, for the purpose of looking after his lawsuit, to which he was a party, and that affiant could not prepare an answer in the case without the presence of Thorp; that Johnson & Heid then and there refused to give affiant any further time in which to file answer in this case, stating that defendant Thorp was not entitled to any favors from them; that affiant said to Johnson & Heid that unless they gave him time to answer by stipulation that it would compell affiant to go to Sitka and obtain from the court an order giving defendant additional time in which to answer. Fifth, that subsequently and at about 2.30 o'clock in the afternoon of said day the plaintiff S. A. Bonnifield called at affiant's office; that he came there unsolicitated by affiant to look after other matters than the suit in question; that affiant called Bonnifield's attention to the fact that the time for answering in this cause had expired, and that affiant would like additional time, and that the said Bonnifield then and there voluntarily and of his own free act signed the stipulation, hereto annexed and marked Exhibit A, giving affiant until March 1st, 1896, in which to file his answer for the defendant; that it was too late for affiant to forward said stipulation for filing with the clerk of this court at Sitka, as the ferry-boat had left for the island, and there was no way to reach the city of Topeka in time in order to send said stipulation to Sitka.

That affiant's reason for having said Bonnifield sign said stipulation in person was that said Bonnifield had during the last term of court discharged his attorney, J. F. Malony, and up to the present time, as deponent — advised and believed, the said Bonnifield has not employed other counsel; at all events, no notice has been given to the defendant or his attorneys, verbally or otherwise, of any substitution of attorneys in place of John F. Malony, Esq.

That, upon the argument of the demurrer at the last term of court

filed by defendants in this cause, the said Bonnifield was unrepresented by counsel, Messrs. Johnson & Heid appearing only for the plaintiff J. G. Heid. Affiant is informed and verily believes to be true that Messrs. Johnson & Heid have no authority to appear
31 for S. A. Bonnifield in this action, and that any action taken by them for Bonnifield is unauthorized & illegal, rendering such action void; that said Johnson & Heid have never in any manner advised the defendant or his attorneys that they were authorized to act for Bonnifield, but, on the other hand, stated in open court that they were not authorized to appear for Bonnifield.

Sixth. That the said default taken by plaintiffs against the defendant on the 26th day of December, 1895, was taken through mistake, inadvertence, and neglect of the attorneys for defendant, as heretofore set forth fully; that affiant relied upon the stipulation of plaintiff S. A. Bonnifield, and therefore did not go to Sitka to get and order of this court giving defendant additional time in which to answer. Affiant further relied upon the fact that the attorneys for John G. Heid, knowing full well that defendant intended to answer, would not attempt to take default or judgment against the defendant herein; that the absence of the defendant from the Territory to attend to a lawsuit, to which he was a party, at North Yakima, Washington, made it impossible for the defendant to answer within the twenty days, on account of the fact that the attorneys for defendant had proceeded with the case under the impression that they had sixty days from the overruling of said demurrer in which to answer, and that when affiant discovered his error, on, to wit, December 23, the defendant Thorp had gone to Washington; that affiant communicated all these facts to Messrs. Johnson & Heid when he requested the signing of a stipulation giving defendant additional time to answer.

That affiant further states that the defendant, Willis Thorp, has fully stated the facts in this case to affiant and to the firm of Bostwick & Crews, counsel for defendant in this cause, and from
32 such statements made by defendant affiant believes that the defendant has a good and substantial defence on the merits of the action.

Affiant further states that defendant does not desire to delay this cause, and that if he be given until March 1st defendant will serve and file his answer herein; that defendant is now in the State of Washington, and is at North Yakima, and affiant is informed and believes to be true *and* that defendant will not return to Juneau before about February 15th, 1896; that affiant makes this affidavit for the reason that he is one of the attorneys for defendant and for the reason that the defendant is absent from the Territory.

Affiant further states that on the 13th day of April, 1895, the defendant, Willis Thorp, made a statement showing, approximately, the earnings and expenses of conducting the mine under the lease and contract set forth in plaintiffs' complaint herein, and that on the same day defendant made an affidavit, swearing that said account was approximately a true and correct statement of all matters connected with his lease of the Bennett mine for 1894; that a copy

of said affidavit and statement of account is here annexed and marked Exhibit B and is made a part of this affidavit. Affiant further states that the said default was taken by the plaintiffs against the defendant through fraud practiced by Johnson & Heid, they well knowing at the time they took default that the defendant intended to file his answer in this cause.

H. BOSTWICK.

Subscribed and sworn to before me this 28th day of December, 1895.

[L. S.]

J. T. HAMILTON,
Notary Public for Alaska.

33

"EXHIBIT A."

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Stipulation.

It is hereby stipulated and agreed that defendant may have until March 1st, 1896, in which to serve and file his answer in the foregoing cause.

Dated December 24, 1895.

S. A. BONNIFIELD, *Plaintiff.*
BOSTWICK & CREWS,
Attorneys for Defendant.

34

"EXHIBIT B."

UNITED STATES,
District of Alaska, } *ss:*

Willis Thorp, being first duly sworn, upon oath says that the foregoing statement of account is approximately a true and correct statement of all matters connected with his lease of the Bennett mine for 1894.

That the foregoing and hereto annexed statement contains the items of expenses incurred in running said mine and the earnings of said mine as nearly as affiant could at the present time ascertain, and that upon a full and complete statement in detail of all and every transaction connected with the lease of said mine for 1894 the same will not materially differ from the hereto annexed account.

WILLIS THORP.

Subscribed and sworn to before me this 13th day of April, A. D. 1895.

HARRISON BOSTWICK,
Notary Public for Alaska.

35 *Bennett Mine Statement—Approximated.*

Total income		$33,000.00
Exp.		
Cost of labor	9,051.70	
Profit and loss	34.60	
Cost of mine supplies, tools, &c	1,075.95	
Cost of cook-house supplies	4,276.07	
Expense—general	4,895.59	
Other expenses	9,130.00	
Balance	4,536.09	
	33,000.00	33,000.00

$\frac{9}{10}$ 4,536.09 $2,551.

Partner's credit		2,551.00
D. C. mortgage	3,936.59	
Fuller note	518.41	
Bonnifield debit	112.00	
Balance Heide bill	200.00	
Balance		2,216.00
	4,767.00	4,767.00
Balance due	$2,216.00	

36 (Endorsed:) Original No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavit of H. Bostwick. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska. Copy of within affidavit received and due service of the same acknowledged this 28th day of December, 1895. Johnson & Heid, attorneys for pl'ffs.

37 And afterwards, to wit, on the said 10th day of January, 1896, defendant filed the following notice of motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska

S. A. Bonnifield and John G. Heid, Plaintiffs, *vs.* Willis Thorp, Defendant. } No. 439. Notice of Motion.

Take notice that upon the affidavit a copy of which is herewith served the undersigned will move the court, at Sitka, on the arrival of the next mail steamer, the City of Topeka, on or about the 8th day of January, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the order of default granted

against the defendant in this action on the 26 day of December, 1895, and also for an order setting aside all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare and serve his answer herein. The defendant's reasons for asking to have said default vacated and set aside are as follows, to wit: First, upon the ground that said default was taken against the defendant through his mistake, inadvertence, surprise, and excusable neglect;
38 second, for the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield, giving the defendant until March 1st, 1896, in which to serve and file his answer; third, for the reason that the defendant's attorneys herein notified the attorneys for John G. Heid, to wit, Johnson & Heid, that they intended to file answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson & Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that the defendant was unexpectedly called away to attend a lawsuit, in which he was a party defendant, at North Yakima, in the State of Washington, and the defendant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that the defendant's attorneys inadvertently overlooked the date when an answer was due in this case until the morning of the 23rd of December, at which time the defendant had gone to Washington; sixth, for the reason that the defendant has a good, substantial, and meretorious defence in this cause.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Johnson & Heid, attorney- for John G. Heid, and to S. A. Bonnifield, plaintiff.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of motion to set aside order of default. Filed Jan. 10, 1896. Charles D. Rogers, clerk.
39 Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska. Copy of within notice of motion received and due service of the same acknowledged this 28 day of December, 1895. Johnson & Heid, attorney- for pl'ffs.

40 And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Motion.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick & Crews, and moves the court for an order vacating, setting aside, and holding for naught the order of default heretofore granted in this action against the defendant and in favor of the plaintiffs; also for an order setting aside and holding for naught all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare, serve, and file his answer herein; that the defendant's reasons for asking to have said default set aside and held for naught, and all subsequent proceedings had by plaintiff set aside and held for naught, and for additional time to serve and file his answer herein are based upon the following grounds, to wit:

First. Upon the ground that said default was taken against the defendant through his mistake, inadvertance, surprise, and excusable neglect.

Second. For the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield giving the defendant until March 1st, 1896, in which to serve and file his answer.

Third. For the reason that the defendant's attorneys herein
41 notified the attorneys for John G. Heid, to wit, Johnson & Heid, that they intended to file an answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson & Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that defendant was unexpectedly called away to attend a lawsuit in which he was a party defendant, at North Yakima, in the State of Washington, and the defendant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that the defendant's attorneys inadvertently overlooked the date when an answer was due in this case until the morning of the 23rd day of December, at which time the defendant had gone to Washington.

Sixth. For the reason that the defendant has a good, substantial, and meritorious defense in this cause.

Seventh. For the reason that the said default was taken by the plaintiffs against the defendant through fraud practiced by Johnson & Heid, attorneys for the plaintiff Heid.

This motion is based upon the affidavit of H. Bostwick, herewith filed, and upon all of the records, files, papers, and proceedings had and done in this action.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Motion. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys
42 for defendant; office address, Juneau, Alaska. Copy of within motion received and due service of the same acknowledged this 28th day of December, 1895. Johnson & Heid, attorney-for pl'ffs.

43 And afterwards, to wit, on the said 10th day of January, 1896, the following stipulation was filed, which is in words and figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Stipulation.

It is hereby stipulated and agreed by the plaintiffs and the defendants, by and through their respective attorneys, that defendant's motion heretofore served and filed in this cause to vacate and set aside the order of default granted on December 26th, 1895, in favor of plaintiffs and against defendant and also defendant's motion for further time to answer in this cause be, and the same is hereby, submitted upon the affidavits and all of the papers, files, records, and proceedings had and done in this cause, to the court, without argument, for the decision thereon.

Dated Juneau, Alaska, January 8, 1896.

JOHNSON & HEID,
Plaintiffs' Attorneys.
BOSTWICK & CREWS,
Attorneys for Defendant.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Stipulation to submit
44 cause without argument. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Affidavit.

THE UNITED STATES, *District of Alaska,* } *ss.*:

John G. Heid, being first duly sworn, says he is a member of the law firm of Johnson & Heid, of Juneau, Alaska, and is also one of the plaintiffs named in the above-entitled action; that said law firm of Johnson & Heid is and at all times since the commencement of the said above-entitled action has been the attorneys for the above-named plaintiffs, as will fully appear from the records and files in said action; that the allegation in the affidavit of H. Bostwick filed herein to the effect that Johnson & Heid stated in open court that they were not authorized to appear for plaintiff Bonnifield is wholly untrue, but, on the contrary, affiant says defendant's attorneys were present in court when C. S. Johnson, of the said law firm of Johnson & Heid, stated that said law firm of Johnson & Heid appeared for and represented said Bonnifield and heard said C. S. Johnson argue the demurrer referred to in said H. Bostwick's affidavit; and the action of said H. Bostwick in submitting to said law firm of Johnson & Heid, this day, a stipulation with reference to his motion to set aside the default entered herein sustains this affiant in his allegation that said Johnson & Heid were at all times since the commencement of said action the authorized attorneys for said plaintiff, Bonnifield.

That in frequent conversations had with said Bonnifield this affiant had never been told that said Bonnifield did not desire the said firm of Johnson & Heid to represent him in said action; on the contrary, expressly stated that it was his positive wish that the said Johnson & Heid should take full care of and manage the said action for him and in his interest, and that when this affiant asked said Bonnifield his reason for signing the stipulation referred to and annexed to said H. Bostwick's affidavit said Bonnifield stated that said Bostwick asked him to sign the same, assuring him (said Bonnifield) that he could in no way lose any rights in said action by so doing; that this action could not be tried before the next term of court, and that he, said Bonnifield, signed said stipulation, believing that the statements made by said Bostwick were true, and that he in no way would thereby prejudice any rights of his own or of his coplaintiff in said action.

JOHN G. HEID.

Subscribed and sworn to before me this 8th day of January, 1896.

[L. S.]

C. S. JOHNSON,
Notary Public for Alaska.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Affidavit of

J. G. Heid. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

46 And afterwards, to wit, on the said 10th day of January, 1896, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Affidavit.

THE UNITED STATES, *District of Alaska,* } *ss:*

C. S. Johnson, being first duly sworn, deposes and says he is a member of the law firm of Johnson & Heid and is and at all times since the commencement of the above-entitled action has been one of the attorneys for the above-named plaintiffs, as will fully appear from the records and files in said action; that the allegation in the affidavit of H. Bostwick, filed herein, to the effect that Johnson & Heid stated in open court that they were not authorized to appear for plaintiff Bonnifield is wholly untrue, but, on the contrary, affiant says defendant's attorneys were present in open court when this affiant stated that he appeared for and represented said Bonnifield and heard this affiant argue the demurrer referred to on behalf of said Bonnifield, as well as of said John G. Heid, and this affiant denies that H. Bostwick was ever informed or believes that Johnson & Heid have no authority to appear for S. A. Bonnifield in this action, or that any action taken by them for said Bonnifield is unauthorized or illegal or renders such action void, but that
47 said statement was made for the purpose of deceiving this court and was an attempt to excuse said attorneys' peculiar conduct in going to affiant's client to procure a stipulation which had been denied by said Bonnifield's attorneys.

Affiant further says that H. Bostwick did not say to Johnson & Heid or either of them, as alleged in his affidavit, that unless they gave him time to answer by stipulation that it would compel him to go to Sitka and obtain from the court an order giving defendant additional time in which to answer; that he did not submit any stipulation to affiant or to John G. Heid, and affiant therefore denies that any such was prepared.

Affiant says that no application of any kind for an extension of time in which to answer was made to plaintiffs' attorneys until the time for answering had expired, although said attorneys have been in their office regularly every day since the demurrer referred to was overruled; that the said Bostwick, after the time for answering had expired and after he had been refused an extension of time by plaintiffs' attorneys, saw S. A. Bonnifield, one of the plaintiffs, and

by falsely and fraudulently representing to said Bonnifield that an extension of time in which to answer could in no way affect his interest in the premises, that the case could not be tried until the next term of court, and that no delay would result in the hearing of said cause, and that he would lose no rights thereby, induced said Bonnifield to sign the so-called stipulation filed with said affidavit.

Affiant says that after a careful examination of the facts obtainable in this action he is convinced that defendant has no legal or equitable defense to interpose; that one of his reasons for such belief is that defendant has stated in affiant's presence that the net profits from the operation of said mine *was* at least $8,000.00,
48 and he believed would be more.

Affiant says he has no reason to believe that defendant ever made the affidavit, a copy of which is purported to be set forth in Bostwick's affidavit herein, except the allegation of the fact therein contained, and affiant therefore calls for the original affidavit.

C. S. JOHNSON.

Subscribed and sworn to before me this 7th day of January, 1896.
[L. S.] J. T. HAMILTON,
Notary Public for Alaska.

(Endorsed:) No. 439. In U. S. dist. court, dist. of Alaska. S. A. Bonnifield *et al. vs.* Willis Thorp. Affidavit. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

And afterwards, to wit, on said 10th day of January, 1896, the plaintiffs filed the following brief, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} Brief of Plaintiffs.

Entry of default after demurrer overruled was held regular, although no notice of the overruling of the demurrer had been served in writing on the defendant, where his attorney was present in court and asked time in which to answer.
49 Hill's Code, note, page 333; Barron *vs.* Deleval, 58 Cal., 95.

A default judgment has the same effect as *res adjudicata* on the merits.
Hill's Code, note, page 333; Neil *vs.* Tolman, 12 Oregon, 289.

Neglect of the attorney is neglect of the party.
Spaulding *vs.* Thompson, 74 Am. Dec., 221 (12 Ind., 477).

A motion to open up a default and to set aside a judgment should be accompanied with a copy of the verified answer which the party desires to be permitted to file, so that the court may judge whether there be a meritorious defense.

Bailey *vs.* Williams, 6 Oregon, page 73.

With respect to section 102, Hill's Code, and 100, old Code, under which defendant's attorneys seek to set aside the default entered in the above-entitled action, the supreme court of Oregon in the case of Deering *vs.* Quinvey, 26 Oregon, pp. 558 and 559, says: "The liberal provisions of the statute above quoted are intended for the benefit of those who by reason of any of the causes there assigned have not had their day in court. The defendants, having had this right, cannot claim any relief under that section of the statute."

Respectfully submitted.

JOHNSON & HEID,
Attorneys for Plaintiffs.

No. 439. In U. S. dist. court, dist. of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Brief of plaintiffs. Filed Jan. 10, 1896. Charles D. Rogers, clerk.

50 And afterwards, to wit, on the 25th day of January, 1896, the defendant filed the following brief, which is in words and figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiff-, *vs.* WILLIS THORP, Defendant. } No. 439. Defendant's Brief.

How and when order of default and judgment will be vacated.

Hill's Code of Oregon, vol. 1, sec. 102, page- 242, '3.

Every court has inherent power to vacate entries in its records for judgments, orders, or decrees.

Ladd *vs.* Mason, 10 Oregon, 308.

The supreme court has power under sec. 102 of the Civil Code (Hill's) to entertain an application to relieve a party from a decree taken against it "through its mistake, inadvertence, or excusable neglect or surprise."

Branson *v.* The Oregon R'y Co., 10 Oregon, 278.

The power to relieve from judgment under this section is discretionary, but the action of the court will be reversed for abuse of discretion.

Bailey *vs.* Taaffe, 29 California, 422.
Johnson *vs.* Eldred, 13 Wisconsin, 482.
Powell *vs.* Weith, 68 N. C., 342.

The power is to be liberally exercised.
Roland *vs.* Kreyenbragen, 19 Catr., 455.
Mason *vs.* McNamara, 57 Ill., 274.

51 Neglect of an attorney is neglect of the party, and if excusable will be ground for relief.
Austin *vs.* Nelson, 11 Mo., 192.
Spaulding *vs.* Thompson, 12 Ind., 477.
See notes to sec. 102, Hill's Code of Oregon.

Where the merits are shown by affidavits, counter-affidavits on that question will not be heard.
Gracier *vs.* Wier, 45 California, 54.
See full discussion on this topic in Freeman on Judgments, chapter VII.

General appearance of defendant in person or by attorney entitles him to notice in writing of all subsequent proceedings.
Sec. 822, vol. 1, Hill's Code of Washington.
" 530, vol. 1, " " of Oregon, page 471.

Also see other sections in title III as to notices, when and how served.
Estee's Practice, sec. 3959, vol. 3, page 34.
California Code Civil Practice, sec. 1014.

Costs of motion, when allowed.
Sec. 568, Hill's Code of Oregon, vol. 1, page 495.

We are of the opinion that where a party has appeared generally in a cause, that he is entitled to notice of all subsequent proceedings; this is the practice in Washington, California, New York, and most, if not all, of the code States.

We think that section 530, vol. 1, Code of Oregon, contemplates that where a party has appeared he is entitled to notice of all subsequent proceedings in the action.

The plaintiff gave no notice to defendant in this case of his motion for default.

52 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Brief of defendant. Judgment or order, when and how vacated. Filed Jan. 25, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendants.

53 And afterwards, to wit, on the said 25th day of January, 1896, the following further proceedings were had in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID, Pl'ffs,
vs.
WILLIS THORP, Def't. } No. 439. Opinion.

This is an action at law brought to recover certain rents and profits alleged to be due the plaintiffs from the defendant under a certain indenture of lease of the Aurora Lode claim, United States survey No. 41, situated in the Silver Bow basin, Harris mining district, Alaska. The complaint was filed on the 15th day of April, 1895, and personal service of the summons was had on the next day, and on the fourth day of May, 1895, defendant entered an appearance by his attorneys. On the 23rd of the same month a general demurrer was entered, which, after hearing, was, on the 3rd day of December, 1895, overruled and an order entered giving the defendant twenty days to answer. On failure to so answer, an order of default was entered against him on the twenty-sixth day of December, 1895. On December twenty-eight motion to vacate the default was served, and by stipulation made January eight, 1896, the motion was submitted on affidavits and all the papers, records, and proceedings in the cause.

While the courts are vested with a large discretion in determining applications of this character, its exercise must be confined to the limits prescribed by statute, which, so far as this court is concerned, are laid down in section 102, Hill's Code of Oregon, pages 242 and 243. This section provides that the court may, in its dis-
54 cretion, "relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The only testimony submitted in support of the application is the affidavit of one of the attorneys for the defendant. The allegations therein set forth are substantially to the effect that he was under the impression that the time to answer was sixty days, but on examination of his office docket on the morning of the 23rd of December, 1895, he learned that the answer was due that day; that he went to the office of Johnson and Heid, the attorneys of record for the plaintiffs, to get an extension of time to answer, but found neither of them in their office when he called, at 10 o'clock a. m.; that he was engaged in his office the balance of said day and did not have an opportunity to see said attorneys until the next morning, when he saw Johnson going to the Juneau wharf with his hand baggage; that he spoke to him and mentioned the fact that the time to answer had expired and wanted an extension, and that Johnson referred him to Heid, and that he soon after prepared a stipulation and went to Johnson and Heid's office, and, after he had stated that his client had been unexpectedly called to the State of Washington, and that he could not prepare an answer without his presence, the attorneys for the plaintiffs then and there refused to extend the time; that affiant then stated that unless they gave him time to answer by stipulation it would compel him to go to Sitka for an order of court for such extension; that thereafter, about 2.30 o'clock p. m., he saw the plaintiff Bonnifield, who

signed with defendant's attorneys a stipulation extending the time until the first of March, 1896; that it was then too late to reach the mail steamer, as the ferry-boat had gone to Douglas island; that his reasons for having Bonnifield sign the stipulation in person was that he had discharged his attorney, Malony, and no notice of substitution of any other attorney had been given; that upon the argument of the demurrer said Bonnifield was unrepresented by counsel, Johnson and Heid appearing for plaintiff Heid; that he is informed and believes that they have no authority to appear for Bonnifield, and that any action taken by them for him is unauthorized; that they have never advised defendant or his attorneys that they were authorized to act for Bonnifield, but, on the other hand, stated in open court that they were not so authorized; that the default was taken through mistake, inadvertence, and neglect, as above fully set forth; that he relied upon the stipulation with Bonnifield, and therefore did not go to Sitka to get an extension, and also relied upon the fact that the attorneys for plaintiff Heid, knowing full well that he intended to answer, would not attempt to take a default or judgment. He also states that the defendant has fully stated the facts in the case to affiant, and from such statement affiant believes that defendant has a good and substantial defense on the merits.

These allegations comprise all the testimony submitted by the defendant that is pertinent to the motion under consideration. Counter-affidavits were filed by each of the plaintiffs' attorneys, denying the allegation that they are not the attorneys for plaintiff Bonnifield and denying that they stated in open court that they were not authorized to represent him. The paramount question to be determined from this testimony is, Does it show such mistake, inadvertence, surprise, or excusable neglect as will warrant the court to set aside the default? Incidentally to this, the question as to whether plaintiff Bonnifield had an attorney of record when the stipulation of the 24th of December, 1895, extending the time, was made and the effect of such stipulation are presented. The incidental questions will be first disposed of.

The summons and complaint both bear the signatures of Johnson and Heid and J. F. Malony, plaintiffs' attorneys, and the complaint is verified by Bonnifield. Service of a notice of appearance for the defendant by his attorneys is admitted May 4th, 1895, by "J. F. Malony and Johnson and Heid, plaintiffs' attorneys," as is also an admission of service, of same date, of notice of motion to make more definite and certain. Service of the demurrer is admitted in the same manner, and in all the proceedings with reference to a writ of attachment and its discharge, subsequently occurring in the cause, notices are addressed by defendant's attorneys to "J. F. Malony and Messrs. Johnson and Heid, attorneys for plaintiffs." On the 19th day of November, 1895, the plaintiff Bonnifield served a written notice upon Malony discontinuing his services, which, however, was not filed until the 10th day of January, 1896, the day upon which all the papers having reference to this motion were filed. The record discloses no changes as to John-

son and Heid nor any proceedings for any change at all, as provided by statute, Hill's Code, sections 1042 and 1043, pages 668 and 669. Upon the record, then, as it appeared upon the 26th day of December, 1895, the day the default was entered, the same attorneys who signed the original summons and complaint were still the attorneys for the plaintiffs. An inference might be suggested from the affidavit submitted in behalf of the defendant that Malony was the attorney for the plaintiff Bonnifield only, and that Johnson and Heid were the attorneys for Heid only. The rule, however, is too well settled to need the citation of any authorities that a separate appearance must be so stated, and a general appearance for plaintiffs and defendants is an appearance by all the attorneys
57 jointly for all the clients; so that upon the record in the case, whatever the status of Malony may have been after he had been discharged by Bonnifield, Johnson and Heid were the attorneys of record for the plaintiffs upon the 24th day of December, 1895, when the stipulation in question was signed by Bonnifield.

There is no principle of practice better settled in our American law, that an appearance in court by an attorney for a client carries with it the presumption of authority to appear. This rule was early laid down by Chief Justice Marshal-, speaking for the Supreme Court of the United States in the case of Osborne *vs.* The Bank of the United States, 9 Wheaton, 739; Law. C. Co. ed., 204. The learned Chief Justice there says: "Certain gentlemen, first licensed by the Government, are admitted by order of court to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any State or of the Union." From the multitude of authorities affirming the rule here stated the following *has* been collated:

Hill *vs.* Mendenhall, 21 Wall. (U. S.), 453; Law. C. Co. ed., 616.
The American Ins. Co. *vs.* Oakley, 9 Paige (N. Y.), 496.
Kelso *vs.* Steiger (Md.), 24 Atl., 18.
Steffe *vs.* Old Colony R. Co. (Mass.), 30 N. E., 1137.
Banks *vs.* Fellows, 28 N. H., 302.
Taylor *vs.* New Orleans, 41 La. Ann., 891; 6 So., 723.
Norberg *vs.* Heineman, 59 Mich., 210; 26 N. W., 418.
58 Reynolds *vs.* Fleming, 30 Kan., 106; 1 Pac., 61.
Vorce *vs.* Page, 28 Neb., 294; 44 N. W., 452.
Garrison *vs.* McGowan, 48 Cal., 592.
Carter *et al. vs.* Koshland, 12 Or., 292; 8 Pac., 556.

The burden of proof rests upon him who denies the authority. Weeks on Attorneys, section 344.

The presumption of authority is not overcome by affidavit of opposing counsel challenging authority if the attorney appearing presents counter-affidavit asserting authority.

Ring *vs.* Vogle Paint and Glass Co., 46 Mo. App., 374.

And allegations of belief are not sufficient; facts must be stated.

Valle *vs.* Pickton, 91 Mo., 207; 3 S. W., 860.

It may be observed here that the absence of any testimony on the part of Bonnifield concerning the matter is quite significant, as it appears that he was in Juneau on the 24th day of December, 1895, when he signed the stipulation.

The practice is also well settled that the authority for an attorney to appear cannot be called into question except by motion directly for that purpose based upon affidavits showing in the first instance *prima facie* a want of authority, and upon the hearing such want must be established by clear and positive proofs. The proceeding may be by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown, and in cases where the validity of an order, judgment, or decree depends on the jurisdiction of the court over the person of a party, acquired solely by an appearance of attorneys, the authority of such attorney may be attacked upon a motion to vacate the order, judgment, or
59 decree. In the absence of some such proceeding directly challenging the authority the court will not hear or inquire into the question of the authority of the attorney for his appearance.

Hollins *vs.* St. Louis and C. R. Co., 32 (N. Y. S. R.), 230.
Mutual Life Ins. Co. *vs.* Penner, 43 (N. J. Eq.), 52; 10 Atl., 184.
Hill *vs.* Mendenhall, *supra.*
McKernon *vs.* Patrick, 4 How. (Miss.), 336.
Hare *vs.* Anderson, 12 (Ky. Law), 303; 14 S. W., 216.
Reynolds *vs.* Fleming, *supra.*
Williams *vs.* Uncompahgre Canal Co., 13 (Colo.), 469; 22 Pac., 806.
Affirmed in Rand *vs.* Dillon, 15 *idem.*, 372; 25 Pac., 185.
Winters *vs.* Means, 25 Neb., 241; 41 N. W., 157.
Turner *vs.* Caruthers, 17 Cal., 432.
People *vs.* Maripoosa County, 39 Cal., 683.

While under the authorities just cited this question is not regularly presented, I have been inclined to pass upon it for the purpose of settling the future practice in this court, and the conclusion reached is that the appearance by Johnson and Heid as plaintiffs' attorneys upon the summons and complaint is an appearance for both plaintiffs, and they ever since have been and now are such attorneys.

This brings us to the consideration of the stipulation made on the 24th of December, 1895, by and between Bonnifield, as plaintiff, and the attorneys for the defendant, extending the time to answer. The court has no doubt whatever that this stipulation must be dis-

regarded. The line of demarcation between the respective rights and powers of an attorney and client is clearly defined. The cause of action, the claim or demand sued upon, the subject-matter of the litigation are within the exclusive control of the client, and
60 the attorney may not impair, compromise, settle, surrender, or destroy them without the client's consent.

Holker *vs.* Parker, 7 Cranch (U. S.), 436.
Bates *vs.* Voorhies, 20 N. Y., 525.
Whitehall Township *vs.* Keller, 100 Pa. St., 45; Am. Rep., 361.
Dickinson *vs.* Hodges, 43 N. J. Eq., 45; 10 Atl., 111.
Moulton *vs.* Bowker, 115 (Mass.), 40.
Crotty *vs.* Eagles, adm'r (W. Va.), 13 S. E., 59.
Mitchell *vs.* Cotton, 3 (Fla.), 136.
Weathers *vs.* Roe, 4 Dana (Ky.), 474.
Peters *vs.* Lawson, 66 (Tex.), 336; 17 S. E., 734.
Repp *vs.* Wiles, (Ind. Appeals), 39 N. E., 441.
Martin *vs.* The Capital Ins. Co. (Ia.), 52 N. W., 534.
Heniman *vs.* Showman, 24 (Kan.), 387 : 36 Am. Rep., 261.
Stokes *vs.* Sheldon, 13 (Neb.), 207.
Moulton *vs.* Bowker, *supra.*

But all the proceedings in court to enforce the remedy, to bring the claim, demand, cause of action, or subject-matter of the suit to hearing, trial, determination, judgment, and execution are within the exclusive control of the attorney. "All acts, in and out of court, necessary or incidental to the prosecution or management of the suit and which affect the remedy only and not the cause of action," are to be performed by the attorney.

Moulton *vs.* Bowker, *supra.*
State *vs.* Hawkins, 28 (Me.), 366.
Cheever *vs.* Merick, 2 (N. H.), 376.
Anon., 1 Wendell (N. Y.), 109; Law Co. ed., 853.
Webb *vs.* Dill, 18 Abbott (N. Y.), 264.
Hughs *vs.* Hollingsworth, 1 Murph. (Tenn.), 146.
61 Thompson *vs.* Pershing, 86 (Ind.), 304.
Wilson *vs.* Spring, 64 (Ill.), 16.
Smith *vs.* Milliken, 2 (Minn.), 319.
Union Bank of Georgetown *vs.* Geary, 5 Peters (U. S.), 99, Law. C. Co. Ed., 60.

A foot-note to the latter case, published in vol. 30–33 of the Lawyers' Co-operative Company's Edition of the U. S. Supreme Court Reports, presents a voluminious citation of authorities as to what acts an attorney may perform in the progress of an action. The rule now under consideration has been followed by the courts of the Pacific States, and the supreme court of California has declared the rule in the following language: "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney he must be heard through him, and it is indispensable to the decorum of the court and the due

and orderly conduct of a cause that such attorneys shall have the management and control of the action, and his acts go unquestioned by any one except the party he represents. So long as he remains the attorney of record the court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorneys. Until that has been done the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorneys. Such a rule is not only indispensable to the orderly conduct of the cause, but is likewise a safeguard to the client against the intrigues of his adversary. Moreover (without being understood as making
62 any reference to the present case), it is proper to add that to entirely ignore the attorney of record and enter, without his consent, into a secret negotiation with his client touching the management of his case is unbecoming the dignity of the profession and is destructive of that courtesy which is due from one member to another." Board of Commissioners *vs.* Younger, 29 Cal., 147. The doctrine here laid down has been repeatedly reaffirmed by the supreme court of the State. The rule now under consideration has also received the weight of legislative sanction. The statutes of Oregon provide: "That where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of his client as between him and the adverse part-." Hill's Code, section 1032, page 680.

A stipulation extending the time to answer is certainly one of the proceedings in or incident to the progress of a cause pending in court, and, as Bonnifield was represented by attorneys when the stipulation was made, his action cannot be recognized by the court.

Additional force is given to the imp-rtance of this rule when it is considered that Bonnifield has a coplaintiff. The action on the part of the plaintiffs is joint, and upon the cause of action set out in the complaint both must recover or neither. The right to a default on the part of the plaintiffs was a vested one on the 24th day of December, 1895, and on that day one plaintiff refuses to waive the right and the other stipulates to do so. Who is to have his way? This dilemma exemplifies in a striking manner the inextricable confusion into which judicial proceedings would be thrown if clients and not their attorneys were permitted to control and manage causes in court. The stipulation, therefore, must be held for naught.

Upon the main question the court is not satisfied from the
63 showing presented that there is such mistake, inadvertence, surprise, or excusable neglect as will justify the vacation of this default. It appears from the affidavits submitted on the part of the defendant that, although the defendant's attorneys had been under the impression that they had sixty days to answer, they did learn from their office docket on the morning of the 23rd of December, 1895, that the time to answer expired that day. After learning this they could not have labored under any mistake, inadvertence,

or surprise concerning the time to answer. The only step taken that day to guard against the default was a call at the office of the plaintiffs' attorneys at 10 o'clock that forenoon, and they were not found. About 10 o'clock the next morning, and after the right to a default had accrued, the affiant met Mr. Johnson on the street with his hand baggage, going to the Juneau wharf, apparently on his way to take the regular mail steamer, which was then at Douglas island, bound thence for Sitka. Here a conversation took place concerning an extension of time, and Mr. Johnson referred the affiant to Mr. Heid. A call on Mr. Heid was immediately made and the extension was refused. Affiant testifies that he stated at this time that unless an extension was granted he would be compelled to go to Sitka and ask the court for further time; but nothing further was done except to obtain the stipulation from Bonnifield about 2.30 o'clock p. m., at which time, it appears, the steamer was still at Douglas island. Although the ferry had then left Juneau, there certainly must have been an opportunity between 10 o'clock a. m. and 2.30 o'clock p. m. for counsel for defendant to reach the steamer. Mr. Johnson reached her after the conversation on the street occurred, came to Sitka by her, and, on the 26th of
64 December, 1895, took his order for default. The court feels constrained to add that a like diligence on the part of counsel for defendant would have prevented the entry of the order.

It further appears from the showing presented in behalf of the defendant that he had fully stated the facts in the case to his attorneys, and upon such statement they had advised him that he had a good and substantial defense on the merits. Attorneys for the defendant were, then, in the position on the 23rd day of December to prepare and, in the absence of their client, verify and serve an answer. That counsel were engaged in their office or did not have an opportunity to see the attorneys for the plaintiff *are* not a sufficient excuse. Neither can any reliance which defendant's attorneys may have placed in any knowledge of opposing counsel as to defendant's intention to answer be considered. Defendant's attorneys may have been, and doubtless were, disappointed that their request for an extension was refused; and under the amenities and courtesies which are usually exchanged among the gentlemen of the bar it would seem that the request might have been granted; but the question for the court to determine is one of law and not of professional ethics, and, on the showing made by the defendant, the case is not one of such mistake, inadvertence, surprise, or excusable neglect as the law contemplates.

Butler *vs.* Morse (N. H.), 23 Atl., 90.
Crig *vs.* Worth, 47 (Md.), 281.
Skinner *vs.* Terry, 107 (N. C.), 103; 12 S. E., 118.
Landa *vs.* McGehee (Tex.), 19 S. W., 516.
Baltimore O. and C. R. Co. *vs.* Flynn (Ind. App.), 28 N. E., 201.
Devenbaugh *vs.* Nifer (*idem*), 29 N. E., 923.
Elton *vs.* Brettschneiber, 23 Ill. App., 355.
65 Elder *vs.* The Bank of Lawrence, 12 Kan., 242.

Haggin *vs.* Lorens, 13 Mont., 406; 34 Pac., 707.
Thomas *vs.* Chambers, 14 *idem*, 423; 36 Pac., 814.
City of Helena *vs.* Brule, 15 *idem*, 429; 39 Pac., 456.
S. C. Herbst Importing Co. *vs.* Hogan, 41 Pac., 135.
Blaine *vs.* Briscow, 41 Pac., 1002.
Jenkins *vs.* Gamewell Fire, etc., Co., Cal., 31 Pac., 570.
Shearman *vs.* Jorgenson, 106 Cal., 483; 39 Pac., 863.
Harbaugh *vs.* Honey Lake Co., 41 Pac., 792.
Myers *vs.* Landrum, 4 (Wash.), 762; 31 Pac., 53.
Haines *vs.* Schwartz, 5 *idem*, 453.
Deering *vs.* Quivey, 26 Or., 566; 38 Pac., 710.

It follows from these views that the motion to vacate the default must be denied, and the plaintiffs will have judgment in accordance with the demand of the summons and complaint.

Dated Sitka, January 25, 1896.

By the court:

ARTHUR K. DELANEY, *Judge.*

(Endorsed:) No. 439. In U. S. district court, district of Alaska. S. A. Bonnifield and John G. Heid, pl'ffs, *vs.* Willis Thorp, def't. Opinion. Filed Jan. 25, 1896. Charles D. Rogers, clerk.

* * * * * * *

66 And afterwards, to wit, on the said 25th day of January, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

In this cause defendant's motion to open default, granted herein on December 26, 1895, having been submitted without argument by stipulation of parties, and the court, now being fully advised in the premises, denies said motion and directs that judgment be entered for plaintiffs in accordance with the written opinion on file herein.

And afterwards, to wit, on the said 25th day of January, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } Judgment by Default.

In this action, the defendant, Willis Thorp, having been duly and regularly served with summons and copy of the complaint filed herein, and after demurrer of defendant to complaint herein having been overruled by the court, defendant has failed to appear

and answer the complaint of plaintiff filed herein, and the legal time for answering the said complaint having expired and no other pleading having been filed, the default of the said defendant,
67 Willis Thorp, in the premises having been duly entered according to law:

Now, at this day, on application of Johnson & Heid, attorneys for plaintiffs, it is hereby ordered that judgment be entered herein against the said defendant, Willis Thorp, in accordance with the prayer of said plaintiffs' complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that S. A. Bonnifield and John G. Heid, plaintiffs, do have and recover of and from the said defendant, Willis Thorp, the sum of seven thousand two hundred thirty-one and $\frac{25}{100}$ dollars ($7,231.25), lawful money of the United States of America, with interest thereon, at the rate of eight per cent. per annum, from the date hereof until paid, together with said plaintiffs' costs and disbursements incurred in said action, amounting to the sum of $33.55.

And it is further ordered, adjudged, and decreed that said plaintiffs do have execution against the property of the said defendant.

Dated January 25, 1896.

By the court:

ARTHUR K. DELANEY, *Judge.*

68 And afterwards, to wit, on the said 10th day of February, 1896, the defendant filed the following notice of motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice of Motion.

You and each of you will please take notice that the defendant, by and through his attorneys, Messrs. Bostwick & Crews, will move before the Honorable Arthur K. Delaney, judge of the district court of the United States for the district of Alaska, at the court-house, in Sitka, Alaska, on the arrival of the next mail steamer, City of Topeka, on or about the 9th day of February, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment heretofore granted and entered in this cause in favor of the plaintiffs and against the defendant on, to wit, January 25, 1896, for the sum of seven thousand two hundred sixty-four
69 and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon the said judgment.

Also for an order permitting and allowing the defendant to file his answer; which is herewith presented, duly verified.

That said motion is based upon the verified answer of said de-

fendant and upon all the files, records, papers, and proceedings had and done in said cause.

Dated Juneau, Alaska, January 29, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson and Heid, attorneys for John G. Heid and S. A. Bonnifield, plaintiffs.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of motion. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within notice received and due service of the same acknowledged this 29th day of January, 1896. Johnson & Heid, attorneys for plaintiffs.

70 And afterwards, to wit, on the 10th day of February, 1896, the defendant filed the following motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Motion.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick & Crews, and moves the court for an order vacating, setting aside, and holding for naught the judgment heretofore granted and filed in this cause, in favor of the plaintiffs and against the defendant, on, to wit, January 25th, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon said judgment.

Also for an order staying, setting aside, and holding for naught any and all subsequent proceedings had by the plaintiffs on account of said judgment.

Also for an order permitting and allowing the defendant to file his answer in this cause.

This motion is based upon the verified answer of the defendant and upon all the files, records, and proceedings had and done in the foregoing-entitled cause.

Dated Juneau, Alaska, January 29th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

71 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Motion. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys

for defendant. Copy of within motion received and due service of the same acknowledged this 29th day of January, 1896. Johnson & Heid, attorneys for plaintiffs.

72 And afterwards, to wit, on the 10th day of February, 1896, the defendant filed his answer in said cause; which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Answer.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick and Crews, and for answer to the plaintiffs' complaint herein admits, denies, and alleges as follows:

I.

Defendant, answering paragraph one of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

II.

Defendant, answering paragraph two of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

III.

Defendant, answering paragraph three of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained; and defendant denies specifically that on the 7th day of May, 1894, or at any other time or at all, that Al. Runkle and S. A. Bonnifield sold, transferred, and assigned to John G. Heid, one of the plaintiffs herein, for a good and valuable consideration, an undivided one-eighth ($\frac{1}{8}$) interest in and to the lease of the
73 Aurora Lode claim, which lease is referred to in plaintiffs' complaint herein and made a part thereof, with the consent of William M. Bennett.

IV.

Defendant, answering paragraph four of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

V.

Defendant, answering paragraph five of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained; and defendant specifically denies that on the 26th day of June, 1894, the plaintiffs, S. A. Bonnifield and John G. Heid, with the consent of William M. Bennett, entered into an agreement

with the defendant, Willis Thorp, by which it was agreed between the parties that, in consideration of said assignment of their right, title, and interest in and to the said premises referred to in plaintiffs' complaint herein, the said Willis Thorp, the defendant herein, was to work and operate the said Aurora Lode claim under said written lease or otherwise except as hereinafter alleged.

VI.

Answering paragraph six of plaintiffs' complaint, defendant denies said paragraph and each and every allegation therein contained; and defendant denies specifically that on the 26th day of June, 1894, or at any other time he entered into an agreement with the plaintiffs herein whereby he agreed to make payment of the mortgage on said Aurora Lode claim held by Robert Duncan, Jr., and J. Parker Corbus, or that he agreed upon that date or at any other time to pay off or assume to pay all and every claim
74 standing against the said premises contracted by the plaintiff S. A. Bonnifield and Al. Runkle; and the said defendant denies specifically that he agreed to mine, work, and operate said premises, and after making all the payments in said lease mentioned, to wit, the mortgage held by Robert Duncan, Jr., and J. Parker Corbus, and assume to pay their debts, that he would divide the profits or any proceeds arising from the operation of said mine and premises, giving to S. A. Bonnifield seven-sixteenths ($\frac{7}{16}$), to John G. Heid two-sixteenths ($\frac{2}{16}$), and retain the balance, seven-sixteenths ($\frac{7}{16}$), himself, or made any other agreement except as hereinafter alleged.

VII.

Defendant, answering paragraph seven of plaintiffs' complaint herein, denies said paragraph and each and every allegation therein contained. Defendant specifically denies the allegation in said paragraph that in the mining and operation of said Aurora Lode claim that he extracted and took therefrom gold of the value of thirty-two thousand dollars ($32,000.00), or that he took out ore to the amount of thirty-five hundred dollars ($3,500.00) and disposed of the same, but, on the contrary, alleges that the entire output of said mine during the time the same was worked, operated, and conducted by defendant did not exceed the sum of thirty thousand dollars ($30,000.00).

VIII.

Defendant, answering paragraph eighth of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained, and defendant alleges that the total cost and expense of operating and conducting said mine, under the lease referred to, was the sum of thirty-five thousand two hundred and sixteen
75 dollars ($35,216.00).

IX.

Defendant, answering paragraph nine of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

Defendant, further answering, and for an affirmative answer and counter-claim, alleges—

That on or about the — day of ——, 189–, the plaintiffs being and then representing to defendant that they were the lessees of that certain mining claim known as the Aurora Lode mining claim, situate in Silver Bow basin, Harris mining district, district of Alaska, and that by reason of the foreclosure of a certain mortgage then held by Robert Duncan, Jr., and J. Parker Corbus they were restrained from operating said mine; that they had no means wherewith to operate the same; that there were other and divers claims against said mine, and that if defendant would pay off the claims, to wit, the mortgage aforesaid and the other claims then pending, that they, the said plaintiffs, would assign to the said defendant the said lease for the mining season of 1894.

That in consideration of said assignment the said defendant was to operate said mine, and out of the net profits thereof pay off the various claims, including the aforesaid mortgage, and *of* the residue of the net profits arising from the operation of said mine, if any there was, should be divided between the plaintiffs and this defendant at the proportion of nine-sixteenths ($\frac{9}{16}$) to be turned over — the said plaintiffs and seven-sixteenths ($\frac{7}{16}$) to be held and retain- by this defendant.

That pursuant to said oral agreement and understanding this defendant went into the possession of said mine and operated the same during the said mining season of 1894.

76 That after paying off the mortgage as aforesaid and other outstanding claims against said mine and the expense of operating and mining said property there *was* no net profits left, but, on the other hand, this defendant paid out and expended in the operation and expense of mining said property and the payment of said claims the sum of thirty-five thousand two hundred sixteen dollars ($35,216.00).

That the total yield from said mine from all of the ore extracted therefrom and otherwise amounted to the sum of thirty thousand dollars ($30,000.00).

That by the terms of said oral agreement aforesaid the plaintiffs were to share and stand their proportion of any loss in the operation of said mine in the same ratio as they were to receive the profits if any were made in the operation of the same.

Therefore by reason of the premises the plaintiffs became indebted to the defendant in the sum of two thousand nine hundred and thirty-four dollars ($2,934.00).

Wherefore defendant prays judgment against the plaintiffs in the sum of two thousand nine hundred thirty-four dollars ($2,934.00).

Juneau, Alaska, February 5th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

UNITED STATES,
District of Alaska, } ss:

Willis Thorp, being first duly sworn, on oath says that he is the defendant in the above-entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true.

WILLIS THORP.

Subscribed and sworn to before me this 5th day of February, A. D. 1896.

77 HARRISON BOSTWICK,
[L. S.] *Notary Public.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Answer. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

And afterwards, to wit, on said date, the defendant filed the following notice and affidavit, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Notice.

You and each of you will please take notice that the affidavit a copy of which is hereto annexed will be used by the defendant upon the motion heretofore served upon you to vacate and set aside the judgment obtained in the foregoing-entitled cause on, to wit, January 25th, 1896.

Dated Juneau, Alaska, January 30th, 1896.

BOSTWICK AND CREWS,
Defendant's Attorneys.

To Messrs. Johnson & Heid, attorneys for John G. Heid.

In the District Court of the United States for the District of Alaska.

78 S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

I, S. A. Bonnifield, being the principal plaintiff in the above-entitled cause and the owner, as appears from the complaint on file in said cause, of seven-eighths (⅞) of the judgment rendered in this cause on the 25th day of January, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), which said judgment was had by default, hereby declare that said judg-

ment is erroneous in this, that the same is too large and for more than is actually due. These facts fully appeared to me subsequent to the signing of said complaint after an investigation and calculation of the accounts, bills, etc., in the hands of the defendant, Willis Thorp; that said judgment should not be for a greater sum than ($800.00) eight hundred dollars.

And as such principal creditor and owner of seven-eighths (⅞) of said judgment I am willing that said judgment so rendered by default, as aforesaid, be set aside and defendant have an opportunity to answer, or that the same be amended so as to be for the amount above set forth, which I hereby assert to be the true amount to be recovered in this cause, and that I make this statement on my own responsibility and for myself, that justice may be done in the premises.

Dated Juneau, Alaska, January 28th, 1896.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 28th day of January, 1896.

[L. S.] HARRISON BOSTWICK,
Notary Public.

79 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavit of S. A. Bonnifield. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within affidavit & notice received and due service of the same acknowledged this 30th day of January, 1896. Johnson & Heid, attorneys for pl'ffs.

And afterwards, to wit, on said date, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice to Attorneys.

You and each of you will please take notice that I have this day settled all of my differences with the defendant, Willis Thorp, in the foregoing-entitled cause; that I have received full satisfaction of the judgment rendered in said cause on, to wit, January 25th, 1896, so far as my seven-eighths (⅞) interest therein is concerned.

That I have endorsed upon the execution issued upon said judgment out of the above-entitled court on, to wit, January 25th, 1896, full satisfaction and settlement of my seven-eighths (⅞) interest in and to said judgment, and have directed the United States marshal for the district of Alaska to take no more proceedings
80 under said execution on account of any sums due me in said judgment; that I have directed the United States mar-

shal for the district of Alaska to return said execution to the court from which the same was issued fully satisfied so far as my judgment is concerned.

You will, therefore, each take notice that I do not wish you to any longer represent me in the foregoing-entitled cause; that your employment by me in said cause is by me this day terminated and at an end, and you will from the date of the service of this notice upon you take no further steps for me as my attorneys in said cause.

You will hereby further take notice that any act or acts, proceeding or proceedings, had or done by you in said cause for or on my behalf after the date of the service of this notice upon you is absolutely unauthorized by me and against my express authority, and any act or acts done by you will be, so far as I am concerned, absolutely void.

Dated Juneau, Alaska, February 1st, 1896. Executed in triplicate.

S. A. BONNIFIELD.

To Messrs. Johnson & Heid, attorneys-at-law, Juneau, Alaska.

Copy of foregoing this day acknowledged. Feb. 1st, 1896.
JOHNSON & HEID.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Discharge of attorneys. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

81 And afterwards, to wit, on said date, the defendant filed the following notice and affidavit, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Notice.

You and each of you will please take notice that affiant will use the affidavit a copy of which is herewith served upon you upon his motion to vacate and set aside the judgment heretofore rendered in this cause at the time and place mentioned and set forth in said notice of motion and motion.

Dated Juneau, Alaska, February 5th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson and Heid, attorneys for John G. Heid.

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Affidavit.

UNITED STATES,
District of Alaska, } *ss:*

82 S. A. Bonnifield, being first duly sworn, upon oath says:

I.

That he is one of the plaintiffs in the foregoing-entitled cause.

II.

That affiant's attorney employed by him in said cause and who exclusively represented his interests therein up to the 13th day of November, 1895, was John F. Malony, at which time affiant discharged said John F. Malony.

III.

That up to that period affiant had not employed Messrs. Johnson and Heid to represent him in said cause, and any papers signed by them as his attorneys was unauthorized by him and was presumptious on their part; that when the demurrer filed in this cause by the defendant was called on to be heard before Honorable Warren Truitt, affiant was not represented by counsel; that he had then discharged John F. Malony and had not employed counsel to represent him, and upon such statement made by affiant to the court the hearing on said demurrer was continued for one day; that affiant in the meantime did employ Messrs. Johnson and Heid to represent his interest in said cause.

IV.

That on the 24th day of December, 1895, John G. Heid came to plaintiff'- rooms and stated to affiant that Bostwick had been in their office asking for time to answer in this action on the part of the plaintiff Heid, and that he, Heid, had refused to give him any time; that said Heid then and there requested affiant not to sign any stipulation giving defendant time to answer; that said Heid said to affiant that they intended to take snap judgment against the defendant Thorp.

83 V.

That subsequently and at 2.30 o'clock of December 24th, 1895, affiant called at the law office of Bostwick and Crews to see Mr. Bostwick about some matters other than the present suit, and during his stay there affiant was requested by Bostwick to sign a stipulation giving the defendant until March 1st, 1896, in which to answer; that said Bostwick stated to affiant that Heid had refused to sign the stipulation, and that unless affiant signed the stipulation he would be compelled to go to Sitka and obtain an order from the

court giving the defendant additional time to answer; whereupon affiant very gladly and willingly, and without any statement or representation from said Bostwick, signed the stipulation, giving the defendant until March 1st, 1896, in which to serve and file their answer; that prior to signing stipulation affiant and defendant had been negotiating for settlement of this cause, and affiant had agreed to take in satisfaction of his claim the sum finally agreed upon; and affiant further states that he had discussed the matter with John G. Heid and they had both agreed that the amount claimed in their complaint was more than was actually due.

VI.

That, in signing said stipulation giving defendant additional time to answer, affiant thought he was doing right, and he believed and still believes he had a right so to do; that affiant did not think it proper or just to take advantage of the defendant or his attorneys and was perfectly willing to and always has been that the defendant should have a right to defend said action in court.

VII.

84 Affiant further states that the amount of damages set forth in their complaint herein was only estimated; that affiant never had an opportunity to see the books, receipts, and papers in connection with the operation and conduct of said mine under the lease mentioned and set forth in plaintiffs' complaint herein; that subsequent thereto and on, to wit, December 24th, 1895, Charles Sumner Johnson, of the firm of Johnson and Heid, went to Sitka and there obtained a- order of default against the defendant Thorp; that the action of said Charles Sumner Johnson in taking said default was unauthorized and unwarranted and against affiant's wishes in the premises; that the default taken on said day should be vacated and set aside and the defendant given an opportunity to file his answer.

VIII.

That subsequently thereto and on, to wit, January 25th, 1896, Messrs. Johnson and Heid went to Sitka and there obtained a default judgment against the defendant for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs, and thereupon caused an execution to be issued thereon.

IX.

Affiant further states that the obtaining of said judgment by default was unauthorized on his part; that said judgment is erroneous inasmuch that the amount therein set forth is too large; that subsequently to the obtaining of said judgment, on, to wit, January 28th, 1896, affiant made a thorough and careful examination of the books kept by defendant during the operation and conduct of said mine, under the lease mentioned and set forth in plaintiffs' complaint herein; that affiant examined all of the vouchers and
85 receipts for money paid out in the operation and conduct of said mine; that affiant examined all of the vouchers show-

ing the output of said mine during his operation and conduct of the same, and that the amount due plaintiffs under said contract from the defendant, as estimated by affiant, was the sum of eight hundred dollars ($800.00) and no more; that, in view of these facts, affiant thereupon and on, to wit, January 28th, 1896, had a full, final, and complete settlement of all his matters and differences with the defendant growing out of the lease and contract mentioned and set forth in plaintiffs' complaint herein, and thereupon received a full and complete settlement and satisfaction for the amount due him, to wit, seven-eighths (⅞) of the judgment obtained in this cause on the 25th day of January, 1896; that affiant thereupon executed a full and complete satisfaction of all his right, title, and claim in and to said judgment, to wit, seven-eighths (⅞) thereof.

That affiant also, on the said 28th day of January, 1896, caused to be endorsed upon the execution issued in said cause upon said judgment a full, complete satisfaction and payment of all moneys due him on said execution on account of said judgment, and directed the United States marshal for the district of Alaska to take no further proceedings under said execution on account of the said judgment due affiant, and further instructed and directed said marshal to return said execution to the clerk of the district court of the United States for the district of Alaska fully paid and satisfied so far as affiant's portion of said judgment is concerned.

X.

That thereafter and on, to wit, January 29th, 1896, affiant called personally at the office of Messrs. Johnson and Heid and in-
86 formed them that he had had a full settlement of all his matters and differences with the defendant, Willis Thorp, and that he had received *sta*isfaction of his portion of said judgment, and that he had signed release and satisfaction of said judgment, and that he had also endorsed upon the execution, then in the hands of the United States marshal, full satisfaction of all sums due him on account of said judgment, and that they need not appear for him further in the matter.

That subsequently thereto and on, to wit, February 1, 1896, affiant caused a written notice to be served upon Messrs. Johnson and Heid discharging them from any further service in said cause.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 8th day of February, 1896.

HARRISON BOSTWICK. [L. S.]
Notary Public for Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavit of S. A. Bonnifield and notice. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within affidavit and notice received and due service of the same acknowledged this 8th day of February, 1896. Johnson and Heid, attorneys for John G. Heid.

87 And afterwards, to wit, on the same date, the defendant filed the following notice and affidavits, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Notice.

You and each of you will please take notice that the affidavits a copy of which is herewith served upon you, will be used by the defendant upon his motion to vacate and set aside the judgment heretofore rendered in this cause at the time and place mentioned and set forth in said notice of motion and motion.

Juneau, Alaska, February 5th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson & Heid, attorneys for John G. Heid.

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Affidavit.

UNITED STATES,
District of Alaska, } *ss*:

88 I, W. E. Crews, being first duly sworn, upon oath depose and say that I am a member of the law firm of Bostwick and Crews, and that as such member I had full charge and control of the affairs and litigation of Willis Thorp, who is a client of our office. It therefore fell upon me to present in the district court of the United States for the district of Alaska and argue the demurrer of Willis Thorp filed to plaintiffs' complaint in the foregoing-entitled cause; that at the time said demurrer was called for argument in the aforesaid court Mr. Malony announced to the court that while he had previously represented Mr. S. A. Bonnifield that he had been discharged, and that he could not further appear for said Bonnifield in the above-entitled cause; that Messrs. Johnson and Heid were in the court-room at that time, either of whom refused to appear for Mr. Bonnifield in said cause, saying they had no authority so to do; whereupon the court adjourned the said cause until the next day at 10 o'clock, in order that the said S. A. Bonnifield have an opportunity to secure counsel, at which time said cause came on for hearing. Mr. C. S. Johnson, of the firm of Johnson and Heid, announced that he had been employed by Mr. Bonnifield to argue the demurrer, at which time the said demurrer was argued, submitted, and overruled.

That at the time of overruling of said demurrer, the court being

near an end, affiant announced his intention to the members of the bar to take a trip abroad, to wit, to the State of Oregon, to be gone about six weeks, and asked that in all cases in which pleadings were due on his behalf be continued for sixty (60) days, which was granted in the five cases then upon the calendar in which Mr. Malony was interested; that Messrs. Johnson and Heid refused to grant more than twenty (20) days in the aforesaid cause.

89 That the fact of Mr. Johnson's employment in the presentation of the demurrer of the defendant was not reported by affiant to Mr. Bostwick; neither was he in the court-room at the time.

Affiant further states that he reported to Harrison Bostwick, his partner, that in all cases in which they were interested that pleadings would not be due until sixty days; that such time had been granted in which to plead. The above case, however, was noted on the office docket by the clerk of the said firm of Bostwick and Crews, saying that answer would be due in twenty (20) days, in accordance with the order of this court and consent of counsel.

That all matters in the above-entitled cause, so far as our firm are concerned, prior to this time have been attended to exclusively by affiant.

W. E. CREWS.

Subscribed and sworn to before me this 4th day of February, 1896.

[L. S.] HARRISON BOSTWICK,
Notary Public for Alaska.

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiff-,
vs.
WILLIS THORP, Defendant. } No. 439. Affidavit.

UNITED STATES,
District of Alaska, } *ss:*

Harrison Bostwick, being first duly sworn, upon oath says that on the morning of the 24th of December, 1895, when affiant

90 was talking to C. S. Johnson, at the time referred to in affiant's former affidavit herein, that he was on his way to the Juneau wharf, and affiant asked said Johnson for further time to file his answer in this case, and said Johnson did not intimate to affiant that he was going to Sitka, or that he would take default or other order in this cause, but referred affiant to his partner, John G. Heid, and affiant was led to believe and did believe from his conversation with said Johnson and Heid that they did not intend to take any default in this case.

II.

That after having this conversation with Messrs. Johnson and Heid affiant obtained the stipulation from the plaintiff Bonnifield,

who is the principle creditor in this cause, and affiant believed that the stipulation from the principle creditor and plaintiff Bonnifield was good in law and was sufficient to give defendant additional time in which to answer and prevent judgment taken by default, and affiant relied implicitly on the above facts, and therefore did not go to Sitka to obtain an order of the court extending the time in which to answer and prevent judgment by default in this cause.

HARRISON BOSTWICK.

Subscribed and sworn to before me this 6th day of February, 1896.

F. D. KELSEY,
[L. S.] *Notary Public for Alaska.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavits of Harrison Bostwick *et al.* Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of the within affidavits & notice received and due service of the same acknowledged this 8th day of Feb'y, 1896. Johnson & Heid, attorney- for pl'ff-.

91 And afterwards, to wit, on said date, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

In this cause defendant's motion for an order setting aside the judgment granted herein on January 25, 1896, coming on regularly to be heard, plaintiff and defendant each being represented by counsel, and after hearing argument of counsel, and the court, being fully advised in the premises, denies said motion; but if there is a mistake in the computation as to the amount of judgment, it may be corrected in that regard, and plaintiffs are given until the arrival of the next steamer, City of Topeka, on or about February 25th, 1896, to file affidavit to show no error exists in said judgment; to which ruling of the court the defendant at the time excepts.

And afterwards, to wit, on said date, the following satisfaction of judgment was filed by the defendant, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, vs. WILLIS THORP, Defendant. | No. 439. Satisfaction of Judgment.

I, S. A. Bonnifield, for and in consideration of the sum of eight hundred dollars ($800.00), gold coin of the United States,
92 to me in hand paid by Willis Thorp, the defendant in the above-entitled action, — full and complete satisfaction is hereby acknowledged of all my right, title, and interest in and to that certain judgment (same being seven-eighths (⅞) thereof) rendered in the United States district court for the district of Alaska, in the above-entitled action, on the 25th day of January, 1896, in favor of the plaintiffs therein and against the defendant, Willis Thorp, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80) and costs; which said judgment is recorded in Book — of Judgments, at page —.

And I hereby authorize and direct the clerk of said court to enter satisfaction of said judgment to the extent aforesaid of record of said judgment in this action.

Dated Juneau, Alaska, this 28 day of January, 1896.

S. A. BONNIFIELD.

UNITED STATES, *District of Alaska*, } ss:

This certifies that on this 28th day of January, 1896, before me, the undersigned, notary public in and for the district of Alaska, duly commissioned and sworn, personally appeared the above-named S. A. Bonnifield, who is personally known to me to be the party subscribing the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

HARRISON BOSTWICK,
[L. S.] *Notary Public for Alaska.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Satisfaction of judgment. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

93 And afterwards, to wit, on the 10th day of February, 1896, the defendant filed his petition for a writ of error, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Petition for Writ of Error.

In the Circuit Court of Appeals for the Ninth Judicial District.

To the Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska:

The petition of Willis Thorp respectfully shows to this honorable court as follows:

That your petitioner is the defendant in the above-entitled cause; that in said cause there was entered at a term of court held at Sitka, Alaska, on January 25th, 1896, a final judgment for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), greatly to the prejudice and injury of your petitioner; which said judgment and proceedings incident thereto are erroneous in many particulars, to the great injury and prejudice of the complainant, your petitioner.

That manifest errors have been made in this cause in the rendering of said judgment to the great damage of this complainant, your petitioner, as same fully appears from the bi l of exceptions filed in said cause and assignment of errors filed herewith.

94 Wherefore, that in order for your petitioner to obtain relief in the premises and for an opportunity to show the errors complained of, your petitioner prays that he may be allowed a writ of error in said cause, and that upon the giving by your petitioner of a bond, as by law required, all proceedings in this court be suspended and stayed until the determination of said writ of error in the United States circuit court of appeals for the ninth judicial district.

And that a transcript of the records, proceedings, and all papers in this cause, duly authenticated, may be transmitted to the honorable circuit court of appeals for the ninth judicial circuit, holding terms in San Francisco, State of California, to determine said writ of errors.

Dated Juneau, Alaska, January 29, 1896.

WILLIS THORP, *Petitioner.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Petition for writ of error. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

95 And afterwards, on said date, the defendant filed his assignment of errors, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Assignment of Errors.

Comes now the said defendant, Willis Thorp, in error, in the above-entitled cause, by Messrs. Bostwick and Crews, his attorneys and solicitors, and says that in the record and proceedings in the above-entitled cause there is manifest error in this:

I.

Because the court erred in overruling defendant's general demurrer to plaintiffs' complaint; to which overruling to said demurrer the defendant then and there excepted, and his exceptions were duly allowed by the court.

II.

Because the court erred in granting the plaintiffs' default for want of an answer in the above-entitled cause for the reason that the plaintiffs never notified the defendant or his counsel, by notice or otherwise, that they intended to apply for said default.

III.

Because the court erred in refusing to set aside the default, granted, as aforesaid, upon the application and showing made by the defendant, Willis Thorp.

IV.

96 Because the court erred in granting judgment on said default:

First. For the reason that no proof was offered in support of the allegations of plaintiffs' complaint.

Second. That there was no application or motion for judgment on said default filed by the plaintiffs, and that the defendant had no notice of the intention of the plaintiffs to apply for or the court granting said judgment, and there was no application in writing, by motion or otherwise, asking for judgment on said default.

V.

The court erred in entering judgment in this cause in favor of the plaintiffs; which said judgment was entered on the 25th day of January, 1896.

VI.

Because the court erred in refusing to deny defendant's motion to open up and set aside the said judgment on the showing made in support of said motion, as shown by the files, records, and proceedings in said cause.

Wherefore the said Willis Thorp prays that the judgment of the United States for the district of Alaska be reversed, and the said

district court be ordered to open up said default and said judgment and to reverse the judgment of said court in overruling defendant's demurrer, and that the defendant have such other and further relief as he is entitled to under the law.

HARRISON BOSTWICK,
W. E. CREWS,
Attorneys for Plaintiff in Error,
Willis Thorp, Juneau, Alaska.

UNITED STATES, *District of Alaska,* } *ss:*

97 I, Louis L. Williams, U. S. marshal for the district of Alaska, hereby certify that on the 10th day of February, 1896, at Sitka, Alaska, I served a certified copy of the within assignment of errors, as furnished by defendant's attorneys, on C. S. Johnson by delivering same to him.

Dated Sitka, Alaska, February 10th, 1896.

LOUIS L. WILLIAMS,
U. S. Marshal,
By W. H. McNAIR, *Deputy.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Assignment of errors. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

98 And afterwards, on said date, the following further proceedings were had in said cause, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Order Allowing Writ of Error.

This 10 day of February, 1896, came the defendant, Willis Thorp, by his attorneys, Messrs. Bostwick and Crews, and filed herein and presented to the court his petition, praying for an allowance of the writ of error intended to be urged by him, praying also that a transcript of the records, proceedings, and papers upon which the judgment herein was rendered, together with all other papers, records, and files in said cause, duly authenticated, may be sent to the United States circuit court of appeals for the ninth judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the court does allow the writ of error upon the defendant giving a bond, according to law, in the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80),

together with and including just damages of delay, costs, and interest on this writ, which shall operate as a supersedeas bond.

Done in open court, at Sitka, Alaska, this 10th day of February, 1896.

ARTHUR K. DELANEY,
Judge of the U. S. District Court for the District of Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Order allowing writ of error. Filed February 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

99 And afterwards, on said date, the defendant filed his bond on writ of error, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Bond on Writ of Error.

Know all men by these presents that we, Willis Thorp, as principal, and Charles W. Young, John Olds, J. D. Matthus, J. G. Peterson, and Emery Valentine, as sureties, are held and firmly bound unto the plaintiffs herein, S. A. Bonnifield and John G. Heid, in the full and just sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), with interest thereon at the legal rate, with costs and expenses of this appeal, to be paid to the said plaintiffs, S. A. Bonnifield and John G. Heid, their certain attorneys, executors, administrators, or assigns; — which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the district court of the United States for the district of Alaska, held at Sitka, in a suit pending in said court between S. A. Bonnifield and John G. Heid, plaintiffs, and Willis Thorp, defendant, a judgment was rendered against the said Willis Thorp for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs; and—

100 The said defendant, Willis Thorp, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiffs, S. A. Bonnifield and John G. Heid, citing and admonishing them to be and appear at a session of the United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in said circuit, on the — day of ——, 1896:

Now, the condition of the above obligation is such that if the said Willis Thorp shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, together with the amount of said judgment and interest thereon, then the above obligation to be void; else to remain in full force and virtue.

WILLIS THORP. [SEAL.]
JOHN OLDS. [SEAL.]
C. W. YOUNG. [SEAL.]
J. G. PETERSON. [SEAL.]
EMERY VALENTINE. [SEAL.]
J. D. MATTHUS. [SEAL.]

Sealed and delivered in presence of—
HARRISON BOSTWICK.
W. E. CREWS.

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

Charles W. Young, John Olds, J. D. Matthus, J. G. Peterson, and Emery Valentine, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally duly sworn, each for himself says—

That he is a resident and freeholder of the district of Alaska; that he is worth the sum of five thousand dollars ($5,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution; that he is not a judge, clerk, or marshal or any other officer of any court in Alaska, and that he is not an attorney-at-law.

101

JOHN OLDS.
C. W. YOUNG.
J. G. PETERSON.
EMERY VALENTINE.
J. D. MATTHUS.

Subscribed and sworn to before me this 6th day of February, 1896.

[L. S.] HARRISON BOSTWICK,
Notary Public for Alaska.

Approved by—
ARTHUR K. DELANEY,
Judge of the United States District Court for the District of Alaska.

This 10 day of February, 1896.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Bond on writ of error. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorney- for defendant.

102 And afterwards, on said date, a writ of error was issued in said cause, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska, Greeting:

The -cause in the record and proceedings, as also in the rendition of the judgment of a plea which in the said district court, before you, between S. A. Bonnifield and John G. Heid, plaintiffs, and Willis Thorp, defendant, a manifest error hath happened, to the great prejudice and damage of the said defendant, Willis Thorp, as is said and appears by the petition herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, in the State of California, together with this writ, so you have the same at the said place, in said circuit, on the 9th day of March, 1896, that, the record and proceedings
103 aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10 day of February, 1896.

Attest my hand and seal of the United States district court for the district of Alaska, at the clerk's office, at Sitka, Alaska, on the day and year last above written.

CHARLES D. ROGERS,
[L. S.] *Clerk United States District Court for the District of Alaska.*

Allowed:
ARTHUR K. DELANEY,
Judge of the United States District Court for the District of Alaska.

This 10 day of February, 1896.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs,

vs. Willis Thorp, defendant. Writ of error. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

104 And afterwards, on said date, there was issued out of said district court of Alaska a citation, which is in words and figures as follows:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Citation.

UNITED STATES OF AMERICA,
District of Alaska, } *ss:*

To S. A. Bonnifield and John G. Heid, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, State of California, on the 9th day of March, in the year of our Lord one thousand eight hundred and ninety-six, pursuant to a writ of error filed in the clerk's office of the United States district court for the district of Alaska, wherein Willis Thorp is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said defendant, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

105 Witness the Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska, this 10 day of February, 1896.

ARTHUR K. DELANEY,
Judge of the United States District Court for the District of Alaska.

UNITED STATES,
District of Alaska, } *ss:*

I, Louis L. Williams, U. S. marshal for the district of Alaska, hereby certify that on the 10th day of February, 1896, at Sitka, Alaska, I served a certified copy of the within citation, as furnished by defendant's attorneys, on C. S. Johnson by delivering same to him.

Dated Sitka, Alaska, February 10, 1896.

LOUIS L. WILLIAMS,
U. S. Marshal,
By W. H. McNAIR, *Deputy.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Citation. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

106 And afterwards, to wit, on the 25th day of February, 1896, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

Now, on this day, this cause coming on to be heard upon the application of Willis Thorp, plaintiff in error, for an extension or enlargement of the time allowing the clerk of this court thirty days, additional time to make his return to the writ of error heretofore issued and served in this cause—

The court being now fully advised in the premises, it is hereby ordered and adjudged that the time be, and the same is hereby, extended for a period of thirty days from the expiration of the time in said writ named.

107 And afterwards, to wit, on the 25th day of February, 1896, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439. Affidavit.

THE UNITED STATES,
District of Alaska, } ss:

John G. Heid, being first duly sworn, deposes and says:

1.

I am one of the plaintiffs in the above-entitled action.

2.

I am a member of the law firm of Johnson & Heid, of Juneau, Alaska, and at all times since the commencement of the above-entitled action and up to the 1st day of February, 1896, have been one of the attorneys for the above-named plaintiffs, as will fully appear from the records and files in said action.

3.

I have read the affidavits of W. E. Crews, Harrison Bostwick, and S. A. Bonnifield, filed herein, copies of which were served upon C. S. Johnson, of said law firm of Johnson & Heid, on board the mail steamer "City of Topeka," on the 8th day of February, 1896, after said steamer had left Juneau and Douglas island, Alaska, for Sitka, Alaska; that it was then too late for affiant to prepare counter-affidavits to be used upon the hearing of defendant's motion to set aside the judgment in this action.

4.

108 That the allegations in the affidavits of said S. A. Bonnifield and W. E. Crews with the respect to the employment of the firm of Johnson & Heid as attorneys for said Bonnifield, as well as in many other respects, are grossly untrue; that from the commencement of the foregoing-entitled action and until after judgment was rendered and entered therein the said firm of Johnson & Heid were during all the times mentioned the attorneys for said plaintiff, Bonnifield, as well as for John G. Heid, the other plaintiff in said action, and as such attorneys were authorized by said Bonnifield to appear and represent him. As an evidence of that fact, affiant says that often and long prior to the discharge by said Bonnifield of Mr. J. F. Malony as one of his attorneys said Bonnifield expressly stated to affiant that he relied upon the said firm of Johnson & Heid to represent and protect his (Bonnifield's) interest in said action, giving as a reason why he depended upon affiant and said law firm of Johnson & Heid that he was afraid of Mr. Malony; that said Mr. Malony was the attorney for one Al. Runkle, whose interest in a certain lease to the Aurora Lode claim conflicted with his (Bonnifield's); that Mr. Malony was also the attorney for the Nowell Gold Mining Company, whose interests in and to part of the said Aurora Lode claim conflicted with his (Bonnifield's), also assigning other reasons; that at no time since the commencement of said action did the said Bonnifield, directly or indirectly, express to affiant his dissatisfaction of the course pursued by affiant and said law firm of Johnson & Heid in his (Bonnifield's) behalf, but, on the contrary, said Bonnifield expressed to this affiant his entire satisfaction and approval of the efforts made by said law firm in his behalf; that even after said Bonnifield signed said stipulation with defendant's attorneys extending the time in which to answer herein
109 said Bonnifield unqualifiedly desired that affiant and said law firm should continue to represent him, and when asked by this affiant his (Bonnifield's) reason for signing said stipulation when his said attorneys and his coplaintiff, this affiant, refused to extend *to* time in which to answer said Bonnifield replied to this affiant, saying that Bostwick & Crews, the attorneys for defendant Thorp, were his attorneys in other actions; that they had and did then attend to his other law matters and suits; that he, so far, had not paid them for their services; that he was under obligations to said Bostwick & Crews for that reason, and that under the circumstances he (Bonnifield) "had to favor them," etc. Affiant further says that neither he nor Johnson, of said law firm of Johnson & Heid, ever refused to appear for said Bonnifield upon the argument of the demurrer referred to in said Crews' affidavit and as alleged therein, but, on the contrary, this affiant states that they, the said law firm of Johnson & Heid, did, with full authority, appear not only for this affiant, but also for said Bonnifield upon the argument of said demurrer and at all times in said action and until after judgment rendered and entered herein. This affiant further says

that said Bonnifield, on the day mentioned when said demurrer was called on for argument, was not in court, nor was he then in the town of Juneau, but was in Silver Bow basin, about three and one-half miles distant from said town of Juneau, in which town the said court was then in session, and the allegation in paragraph III of said Bonnifield's affidavit that when said demurrer was called on to be heard said Bonnifield was not represented by counsel is false *in toto*, and the further statement contained in said paragraph III of said Bonnifield's affidavit to the effect that upon such a statement made by said Bonnifield to the court the hearing on
110 said demurrer was continued for one day is absolutely false, and the said Bonnifield, at the time of making said affidavit, knew the said allegation to be wholly untrue; that at the time mentioned with reference to the argument on said demurrer the said firm of Bostwick & Crews appeared for and represented the defendant, Willis Thorp, in this said action, and the said law firm of Johnson & Heid appeared therein for plaintiffs; that said Bonnifield was not, at the times mentioned, in the court-room nor near it, and there did not make and could not have made any statement to the court whatever.

5.

Affiant says that he was in the court at the time said Crews, on behalf of the said firm of Bostwick & Crews, near the end of the term of said district court, arranged with some of the opposing attorneys the time within which to plead in all cases of said firm wherein pleadings were due, and affiant says that said Crews did not announce his intention to the members of the bar to take a trip abroad, and no such statement or similar statement was made by said Crews to affiant when the court granted defendant herein 20 days within which to answer.

6.

Affiant says that owing to the peculiar professional methods of said firm of Bostwick & Crews, whose habit it is to approach the client of opposing counsel in order to gain an advantage to the said client's decided disadvantage, this affiant, believing that said Harrison Bostwick, of said firm of Bostwick & Crews, would not forego his practice in this case, took the precaution to call upon said Bonnifield (affiant's client) on or about December 24, 1895, and did state to said Bonnifield that the defendant in this action had failed to answer the complaint; that the time for answering the same
111 had expired; that affiant had refused to extend the time within which to answer, and that affiant had sent to the clerk of the court a motion for judgment for failure to answer; that Mr. C. S. Johnson, one of Bonnifield's attorneys, was then about to sail for Sitka to present the said motion for judgment to the court; that said Bonnifield should not permit himself to be persuaded to enter into any stipulations with said Harrison Bostwick with respect to the matter, and affiant further says that, in the conversation with said Bonnifield on said day, the words "snap judgment" were never used by affiant.

7.

Affiant further says he has read the statement published in the Alaska Mining Record, a newspaper published in the said town of Juneau, Alaska, which statement, in substance, is also set forth in said Bonnifield's affidavit, to the effect that not more than $800 is justly due said plaintiffs upon said judgment. Affiant says that said statement is wholly untrue, and the said firm of Bostwick & Crews, with whom the said Bonnifield is said to have had his alleged settlement of his share of the judgment herein, full well know that said statement is false. Affiant further says that said Bonnifield stated to this affiant that when making his alleged settlement he had forgotten or overlooked the sum of $3,500.00 to be charged said defendant, Thorp, for the ore mentioned in the complaint herein; also further stated that he did not examine the accounts, but simply settled on the gross sums which had been then submitted to him, and that he (Bonnifield) did not know if the statement and figures shown him at the so-called settlement were correct. Affiant further says that he, in company with Mr. J. F. Malony, the principal counsel then for said Bonnifield in
112 this matter, together with said Bonnifield, before the commencement of this action, did fully examine all the vouchers and receipts furnished by said defendant, Thorp, he, Thorp, claiming the same to be a full and complete account of the receipts and expenditures except the account of the Alaska Treadwell Gold Mining Company; which said account was approximated by said Bonnifield and allowed in a greater amount than was thought to be actually due thereon; that said Bonnifield represented that he had purchased the supplies for said Aurora lode or mine, was present during the working and operating of the same, and was familiar with all the expenses incurred except the labor account; that, not being familiar with said labor account, the same was allowed in full as presented by said defendant, Thorp; that all other items of receipts and expenditures were carefully examined by affiant, said Bonnifield, and said Malony, some time being consumed in said work; that each item allowed or disallowed in making up said account was allowed at the instance and request of said Bonnifield, who claimed to have and did have personal knowledge of said receipts and expenditures; that the amount claimed in said complaint was arrived at after said examination and compilation and after giving said defendant, Thorp, credit for all expenditures and claims justly due him, as shown by the receipts and vouchers furnished affiant by said Thorp, as aforesaid, and said amount sued for, to wit, $7,231.25, was found to be justly due said plaintiffs by affiant and said Bonnifield and said John F. Malony.

Affiant further says that in preparing the complaint filed in this action and upon which judgment has been rendered full credit was given the defendant for the amount paid by him in satisfaction of the mortgage held by Robert Duncan, Jr., and J. Parker Corbus and for all and every account and claim assumed or paid by
113 defendant for and on behalf of said Bonnifield and Runkle, and all of said amounts were included in and are part of the

$23,000.00 allowed to defendant as expenses incurred by him in working and operating said mine; that after allowing to defendant the amount of said mortgage and all of said accounts and all other expenses incurred by him in working and operating said mine there was found to be $12,500.00 profits to be divided, as in said complaint set forth. Affiant further says that he denies that he at any time agreed with said Bonnifield that the amount claimed in the complaint was more than was actually due, as is alleged in said paragraph V of said Bonnifield's affidavit.

8.

Affiant further says that if a settlement between the defendant Thorp, by and through his attorneys, Bostwick & Crews, and the said Bonnifield was had in good faith on the part of said Bonnifield, as alleged by him, then the said Bonnifield has been wronged in said settlement to the extent of at least $4,000.00.

9.

Affiant further says that the said Bonnifield never was the owner of $\frac{1}{8}$ parts of the judgment rendered in this action, as alleged in his and other affidavits on file herein, but was entitled to $\frac{7}{8}$ only of the same, as will fully appear from the complaint and other files in this action; that the alleged settlement of and payment to said Bonnifield of his interest in said judgment, if any such was really had, was without the knowledge and consent of his attorneys or either of them or his coplaintiff.

JOHN G. HEID.

Subscribed and sworn to before me this 24th day of February, 1896.

[L. S.]

C. S. JOHNSON,
Notary Public.

114 I acknowledge receiving a copy of the above affidavit of the above date.

W. E. CREWS.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. S. A. Bonnifield and J. G. Heid *vs.* Willis Thorp. Affidavit of J. G. Heid. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

And afterwards, on the same date, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

THE UNITED STATES, *District of Alaska,* } *ss:*

I, C. S. Johnson, being duly sworn, depose and say:

1.

I have read the affidavits of S. A. Bonnifield, W. E. Crews, and Harrison Bostwick filed herein, copies of which were served upon me on board the mail steamer "City of Topeka," on the 8th day of February, 1896, after said boat had left Juneau and Douglas island, Alaska, for Sitka, Alaska; that it was too late for affiant to prepare counter-affidavits to be used upon the hearing of defendant's motion to set aside the judgment in this action.

2.

That the allegations in the affidavit- of said S. A. Bonnifield and W. E. Crews in reference to the employment of the firm of Johnson & Heid, as attorneys for said S. A. Bonnifield, are untrue in
115 many respects; that said firm of Johnson & Heid were at all times from the commencement of said action until after judgment was rendered fully employed and authorized by said Bonnifield to appear for and represent him as his attorneys. As an evidence of that fact, affiant says that on many occasions, long prior to the discharge by him of Mr. John F. Malony as one of his attorneys, said Bonnifield assured affiant that he looked to and depended upon him to represent and protect his (Bonnifield's) interests in said action, assigning as a reason why he specially depended upon affiant that he was afraid of Mr. Malony; that ever since the commencement of this action affiant has been in frequent communication with said Bonnifield up to the time and after taking of default herein, and upon such occasions said Bonnifield expressed his entire satisfaction and approval of the course pursued by affiant and said John G. Heid in his behalf; that after the default had been entered herein, and after said Bonnifield had signed the stipulation with defendant's attorneys extending the time in which to answer in this action, affiant asked him if he desired the firm of Johnson & Heid to continue to represent him; he assured affiant that he did, and expressed his satisfaction and approval of what had been done in taking said default.

Affiant further says when the demurrer filed herein was called for argument neither he nor Mr. Heid refused to appear for said Bonnifield, nor did either Mr. Heid or affiant say they had no authority so to do. On the contrary, this affiant said in open court on said occasion that while we (the firm of Johnson & Heid) had appeared with Mr. Malony for Mr. Bonnifield we preferred to see Mr. Bonnifield before proceeding further, inasmuch as he had discharged Mr.

Malony, his principal attorney. Whereupon the court continued the hearing upon said demurrer until the next day. In the
116 meantime affiant asked said Bonnifield whether he desired the firm of Johnson & Heid to continue to represent him in said action. He assured affiant that he did, saying that he depended upon us to take care of his interests. Affiant therefore announced on the following day in open court and in the presence of defendant's attorney that he had seen Mr. Bonnifield, and was authorized by him to continue to represent his interest in said action; and affiant says said S. A. Bonnifield was not in court when said demurrer first came on for hearing, and did not state to the court, as alleged in his affidavit, that he had not employed counsel to represent him, etc., but said allegation is wholly untrue.

3.

Affiant further says he was in court at the time of the overruling of said demurrer, yet he did not hear said W. E. Crews announce his intention to take a trip abroad, and did not hear him ask that in all cases in which pleadings were due on his part that the same be continued for sixty days. On the contrary, affiant says no such statement was made, nor was affiant at any time asked by said W. E. Crews or by H. Bostwick to extend the time beyond the 20 days in which to answer, until after default had been made, to wit, on the 24th day of December, 1895; that the 20 days granted by the court in which to answer was so granted at the request of said W. E. Crews and assented to by this affiant.

What report said W. E. Crews made to his partner, Mr. Bostwick, in regard to the time given in which to answer affiant is unable to state; but affiant says the clerk of the firm of Bostwick & Crews was not in court when the demurrer was overruled and the time fixed in which to answer, and could only have made the docket entry referred to upon information given her by her employers.

117 4.

And affiant further says said S. A. Bonnifield never was the owner of $\frac{7}{8}$ of the judgment rendered in this action, as alleged in his and other affidavits on file herein, but was entitled to $\frac{7}{9}$ only of the same, as will fully appear from the complaint and other files in this action; that the alleged settlement of and payment to said Bonnifield of his interest in said judgment, if any such was had, was without the knowledge or consent of his attorneys or either of them; that the first information had that said Bonnifield was dissatisfied with the judgment rendered or had made any settlement of the same with said defendant was his published statement to that effect in the "Alaska Mining Record," a newspaper of general circulation published at Juneau, Alaska; that after said publication and after said Bonnifield had made his pretended settlement and received his share of said judgment he assured this affiant he had not received his money from defendant upon said settlement, but expected to do so, and affiant is unable to explain the action of said

Bonnifield in reference thereto since the rendering of said judgment, as he has at all times since said suit was commenced until said pretended settlement was had claimed that the amount in his complaint alleged was justly due; but affiant knows said Bonnifield is indebted in the sum of several thousand dollars; that there are many unsatisfied judgments now standing against him on the judgment dockets of the courts of Alaska; that the said Bostwick & Crews are his attorneys in suits now pending involving much larger amounts than the amount of the judgment rendered herein, and that he has been in close communication with them ever since and even prior to the taking of the default in this action, and affiant believes for these and other reasons which must be apparent to the court
118 said S. A. Bonnifield has been induced by said Bostwick & Crews to pursue the course he has for the purpose of aiding them and impeding his coplaintiff, John G. Heid, in the collection of his just claim against said defendant.

C. S. JOHNSON.

Subscribed and sworn to before me this 20th day of February, 1896.

J. F. MALONY,
[L. S.] *Notary Public.*

I acknowledge receiving a copy of the above affidavit of the above date.

W. E. CREWS.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Affidavit of C. S. Johnson. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, attorneys for pl'ff Heid.

And afterwards, on the same date, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID *vs.* WILLIS THORP. } No. 439. Affidavit.

THE UNITED STATES, *District of Alaska,* } ss:

I, John F. Malony, being first duly sworn, depose and say that at the time of the commencement of the above-entitled action I was one of the attorneys for S. A. Bonnifield, one of the above-named plaintiffs; that as such attorney I drew and prepared the
119 complaint now on file in said action, and upon which judgment was rendered in favor of said plaintiffs on the 25th day of January, 1896.

That prior to the making and filing of said complaint I requested

of defendant, Willis Thorp, an itemized statement of the receipts and expenditures incident to the operation of the Aurora Lode claim; that said defendant failed and neglected for a long time to furnish affiant or said Bonnifield with any statement, but that about ten days or two weeks prior to the making and filing of said complaint said defendant did furnish affiant with certain vouchers and receipts, claiming the same to be a full and complete account of said receipts and expenditures except the account of the Alaska Treadwell Gold Mining Company, which said account was approximated by said Bonnifield and allowed in a greater amount than was thought to actually be due thereon; that upon receipt of said vouchers and receipts this affiant, together with said Bonnifield and said John G. Heid, carefully examined and compiled the same; that affiant and said Heid were guided, directed, and controlled in said work by said S. A. Bonnifield; that said Bonnifield represented that he had purchased the supplies for said mine, was present during the working and operating of the same, and was familiar with all expenses incurred except the labor account; that not being familiar with said labor account the same was allowed in full as presented by said defendant, Thorp; that all other items of receipts and expenditures were carefully examined by affiant and said Bonnifield and Heid, several days being consumed in said work; that each item allowed or disallowed in making up said account was allowed or disallowed at the instance and request of said Bonnifield, who claimed to have and did have personal knowledge of said receipts and expenditures; that the amount claimed in said com-
120 plaint was arrived at after said examination and compilation and after giving said defendant, Thorp, credit for all expenditures and claims justly due him as shown by the receipts and vouchers furnished affiant by said Thorp, as aforesaid, and said amount sued for, to wit, $7,231.25, was found to be justly due said plaintiffs by affiant and said S. A. Bonnifield and said John G. Heid.

Affiant further says he has read the statement published in the Alaska Mining Record, purporting to be the statement of said Bonnifield, wherein he claims that not more than $800.00 is justly due said plaintiffs upon said judgment; that if said statement is true then said S. A. Bonnifield wilfully misrepresented the facts in said case to this affiant and said John G. Heid and wilfully and intentionally misled the court in the premises; but affiant says from his knowledge of the facts in said action obtained from a careful examination of said vouchers and receipts and from the statements made to him by said S. A. Bonnifield he believes that the true amount due said plaintiffs is the sum for which judgment has been rendered in said action, and that said Bonnifield has been induced to make statements to the contrary for reasons unknown to affiant.

Affiant further says that in preparing the complaint filed in this action and upon which judgment has been rendered full credit was given the defendant for the amount paid by him in satisfaction of the mortgage held by Robert Duncan, Jr., and J. Parker Corbus, and for all and every account and claim assumed or paid by him for and

on behalf of said Bonnifield and Runkle, and all of said amounts were included in and are a part of the $23,000.00 allowed to defendant as expenses incurred by him in working and operating said mine; that after allowing to defendant the amount of said
121 mortgage and all of said accounts and all other expenses incurred by him in working and operating said mine there was found to be $12,500.00 profits to be divided as in said complaint set forth.

Affiant says he is not, nor was he at the time judgment was rendered, an attorney in said action nor has he any interest in the result of said suit, but that this affidavit is made that substantial justice may be done in the premises.

J. F. MALONY.

Subscribed and sworn to before me this 20th day of February, 1896.

C. S. JOHNSON,
[L. S.] *Notary Public for Alaska.*

I acknowledge receiving a copy of the above affidavit of the above date.

W. E. CREWS.

(Endorsed:) No. 439. In U. S. district court, district of Alaska. S. A. Bonnifield *et al. vs.* Willis Thorp. Affidavit of J. F. Malony. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ff Heid.

122 And afterwards, to wit, on the 25th day of February, 1896, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

Now, on this 25th day of February, 1896, this cause coming on to be heard upon the motion of Willis Thorp, plaintiff in error herein, to strike from the files the affidavits of John G. Heid, C. S. Johnson, and John F. Malony for the reasons, as shown by the record, that the assignment of errors was filed, the writ of error issued and served, and the citation issued and served fifteen days prior to the filing of the affidavits; that the affidavits do not tend to explain the point for which they were allowed by the court; that the court has no jurisdiction to consider said affidavit- or to permit them to be made part of the record herein, the same having been filed so long after the writ of error was issued and the citation issued and served and the bill of exceptions settled and filed—

And the court, being fully advised in the premises, hereby orders that the motion be overruled and the affidavits be made part of the record; to which order of the court counsel for plaintiff in error duly excepted, and his exception was by the court allowed.

123 And afterwards, to wit, on the 25th day of February, 1896, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Notice.

You and each of you will please take notice that an application will be made before Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska, for a settlement of the statement of facts or bill of exceptions and the signing of the same in the foregoing-entitled cause on the arrival of the mail steamer City of Topeka at the town of Sitka, Alaska, on or about the 24th day of February, 1896, or as soon thereafter as counsel can be heard; a copy of which said statement of facts will be served upon you before the departure of said mail steamer City of Topeka from Juneau to Sitka.

Juneau, Alaska, February 13th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson & Heid, attorneys for John G. Heid.

Copy of within notice received and due service of the same acknowledged this 13th day of February, 1896.

JOHNSON & HEID,
Attorneys for John G. Heid.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

124 And afterwards, to wit, on the 25th day of February, 1896, the defendant filed his bill of exceptions, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Bill of Exceptions.

Be it remembered that this cause was duly called for hearing in the United States district court for the district of Alaska at the November term, 1895, upon defendant's general demurrer to plaintiffs' complaint. Said demurrer and the questions raised thereby *was* duly argued and submitted to the court, who, after duly considering the same, made an order overruling defendant's general demurrer

to plaintiffs' complaint; to which order overruling defendant's general demurrer to plaintiffs' complaint defendant duly excepted; which exception was allowed by the court.

Whereupon defendant was allowed by the court and consent of counsel twenty (20) days in which to file his answer.

That soon thereafter, on the 26th day of December, upon the expiration of the twenty (20) days in which to answer, defendant having failed within the time to serve and file his answer, plaintiffs, without notice to the defendant, made application to the United States district court for the district of Alaska, at Sitka, for default and judgment against the defendant.

Whereupon the court permitted the plaintiffs to take default.

That thereafter and immediately upon the entering of said
125 default, to wit, as soon as the boat arrived from Sitka, counsel for defendant prepared and served upon counsel for plaintiffs notice of motion and motion to set aside the default entered as aforesaid; which said notice of motion and motion *is* in words and figures as follows:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice of Motion.

Take notice that upon the affidavits *a* copies of which *is* herewith served the undersigned will move the court, at Sitka, on the arrival of the next mail steamer, the City of Topeka, on or about the 8th day of January, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the order of default granted against the defendant in this action on the 26th day of December, 1895, and also for an order setting aside all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare and serve his answer herein; that the defendant's reasons for asking to have said default vacated and set aside are as follows, to wit:

First. Upon the ground that said default was taken against the defendant through his mistake, inadvertance, surprise, and excusable neglect.

Second. For the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield, giving the de-
126 fendant until March 1st, 189[illegible], in which to serve and file his answer.

Third. For the reason that the defendant's attorneys herein notified the attorneys for John G. Heid, to wit, Messrs. Johnson and Heid, that they intended to file answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson and Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that the defendant was unexpectedly called away to attend a lawsuit, in which he was a party defendant, at North Yakima, in the State of Washington, and the defendant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that the defendant's attorneys inadvertantly overlooked the date when an answer was due in this case until the morning of the 23rd of December, 1895, at which time the defendant had gone to Washington.

Sixth. For the reason that the defendant has a good, substantial, and meritorious defense to this cause.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Johnson & Heid, attorneys for John G. Heid, and to S. A. Bonnifield, plaintiff.

Copy of within notice of motion received and due service of the same acknowledged this 28th day of December, 1895.

JOHNSON & HEID,
Attorneys for Plaintiffs.

Motion.

127 Comes now the defendant, by and through his attorneys, Messrs. Bostwick and Crews, and moves the court for an order vacating, setting aside, and holding for naught the order of default heretofore granted in this action against the defendant and in favor of the plaintiffs; also for an order setting aside and holding for naught all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare, serve, and file his answer herein; that the defendant's reasons for asking to have said default set aside and held for naught, and all subsequent proceedings had by plaintiffs set aside and held for naught, and for additional time to serve and file his answer herein are based upon the following grounds, to wit:

First. Upon the ground that said default was taken against the defendant through his mistake, inadvertance, surprise, and excusable neglect.

Second. For the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield giving the defendant until March 1st, 1896, in which to serve and file his answer.

Third. For the reason that the defendant's attorneys herein notified the attorneys for John G. Heid, to wit, Messrs. Johnson and Heid, that they intended to file an answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson and Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that defendant was unexpectedly called away to attend a lawsuit, in which he was a party defendant, at

North Yakima, in the State of Washington, and the defend-
128 ant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that defendant's attorneys inadvertently overlooked the date when an answer was due in this case until the morning of the 23rd day of December, at which time the defendant had gone to Washington.

Sixth. For the reason that the defendant has a good and meritorious defense in this cause.

Seventh. For the reason that the said default was taken by the plaintiffs against the defendant through fraud practised by Johnson & Heid, attorneys for the plaintiff Heid.

This motion is based upon the affidavits of H. Bostwick herewith filed and upon all the records, files, papers, and proceedings had and done in this action.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

Copy of within motion received and due service of the same acknowledged this 28th day of December, 1895.

JOHNSON & HEID,
Attorneys for Plaintiffs.

Together with the filing and serving of said notice of motion and motion upon plaintiffs' attorneys, counsel for defendant made and served affidavits in support thereof, as shown by the records and files in this cause.

That thereafter a stipulation was entered into between counsel for plaintiffs and defendants that said motion be submitted to the judge of the United States district court for the district of Alaska, at Sitka, upon the affidavit and briefs of counsel without argument.

129 That thereafter, on, to wit, the 25th day of January, 1896, the court, after considering the motion, affidavits, files, and records in support thereof, made an order denying defendant's motion to vacate and open up said default, and thereupon, without further notice or motion, and at the same time, rendered judgment against the defendant, in accordance with the prayer of plaintiffs' complaint; to which ruling of the court defendant thereafter duly excepted, and his exceptions were duly allowed by the court.

That thereafter and immediately upon notice from the court of the fact of the overruling of said motion defendant made, prepared, and served his notice of motion and motion upon the attorneys for plaintiffs to set aside and vacate the judgment so rendered and for permission to file his answer; which said notice of motion and motion are in words and figures as follows:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Notice of Motion.

You and each of you will please take notice that the defendant, by and through his attorneys, Messrs. Bostwick and Crews, will move before Honorable Arthur K. Delaney, judge of the district court of the United States for the district of Alaska, at the courthouse, in Sitka, Alaska, on the arrival of the next mail steamer, City of Topeka, on or about the 9th day of February, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment heretofore granted and entered in
130 this cause in favor of the plaintiffs and against the defendant, on, to wit, January 25th, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon the said judgment.

Also for an order permitting and allowing the defendant to file his answer, which is herewith presented, duly verified.

That said motion is based upon the verified answer of said defendant and upon all affidavits, the files, records, papers, and proceedings had and done in said cause.

Dated Juneau, Alaska, January 29, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson and Heid, attorneys for John G. Heid and S. A. Bonnifield, plaintiffs.

Copy of within notice of motion received and due service of the same acknowledged this 29th day of January, 1896.

JOHNSON & HEID,
Attorneys for Plaintiffs.

Motion.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick and Crews, and moves the court for an order vacating, setting aside, and holding for naught the judgment heretofore granted and filed in this cause in favor of the plaintiffs and against the defendant, on, to wit, January 25th, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

131 Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon said judgment.

Also for an order staying, setting aside, and holding for naught any and all subsequent proceedings had by the plaintiffs on account of said judgment.

Also for an order permitting and allowing the defendant to file his answer in this cause.

This motion is based upon the verified answer of the defendant and upon all the files, records, affidavits, and proceedings had and done in the foregoing-entitled cause.

Dated Juneau, Alaska, January 29th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

Copy of within motion received and due service of the same acknowledged this 29th day of January, 1896.

JOHNSON & HEID,
Attorneys for Plaintiffs.

In support of which said motion affidavits and verified answer, as indicated by the records herein, were filed with said court.

That thereupon and on, to wit, the 10th day of February, 1896, plaintiffs and defendant appeared before the court, by their respective attorneys, and argued said motion to set aside said judgment, default, and leave to file verified answer herein. After hearing argument of counsel the court made an order denying defendant's motion to set aside and vacate said judgment and for leave to file an answer; to which order of the court defendant duly excepted, and his exception was duly allowed by the court.

BOSTWICK AND CREWS,
Attorneys for Defendant in Error.

132 The foregoing bill of exceptions is correct, and it is hereby agreed that the same may constitute a part of the record and be certified to the court of appeals, and there be used as the bill of exceptions in this cause.

JOHNSON & HEID,
Attorneys for Defendant in Error, John G. Heid.
BOSTWICK AND CREWS,
Attorneys for Plaintiff in Error, Willis Thorp.

The foregoing bill of exceptions is correct, and is hereby settled and allowed and ordered to be made part of the record in this cause.

Dated Sitka, Alaska, this 25 day of February, 1896.

ARTHUR K. DELANEY, *Judge.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. Bonnifield and Heid, plaintiff-, *vs.* Willis Thorp, defendant. Bill of exceptions. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within bill of exceptions received and due service of the same acknowledged this 17th day of Feb., 1896. Johnson & Heid, attorneys for def't in error, John G. Heid.

133 UNITED STATES OF AMERICA, *District of Alaska*, } 88:

I, Charles D. Rogers, clerk of the district court of the United States of America for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to (133) one hundred thirty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of S. A. Bonnifield and John G. Heid, plaintiffs, *vs.* Willis Thorp, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the town of Sitka, in said district, the 11 day of March, A. D. 1896.

[Seal United States District Court, Alaska.]

CHARLES D. ROGRRS, *Clerk.*

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } Clerk's Certificate.

I, Charles D. Rogers, clerk U. S. district court, district of Alaska, do hereby certify that the cost for certificates and comparing the transcript in the above-entitled cause is fifteen dollars (copies of the pleadings and orders having been prepared by the defendant), which amount I have received from the defendant, Willis Thorp.

In witness whereof I have hereunto set my hand and affixed the seal of said court.

[Seal United States District Court, Alaska.]

CHARLES D. ROGERS,
Clerk U. S. District Court.

134 At a stated term, to wit, the October term, A. D. 1897, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Tuesday, the sixth day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

WILLIS THORP, Plaintiff in Error,
v.
S. A. BONNIFELD ET AL., Defendants in Error. } No. 289.

Pursuant to an act of Congress entitled "An act providing for the transfer from the circuit court of appeals for the ninth circuit to the Supreme Court of certain appeals from the district court for Alaska," approved July 8, 1898, upon application of Harrison Bostwick, Esquire, counsel for the plaintiff in error, it is ordered that the original certified transcript of record herein be transmitted by

the clerk of this court to the Supreme Court of the United States.

135 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within-entitled cause.

Attest my hand and the seal of said circuit court of appeals this 7th day of Sept., A. D. 1898.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[5-cent U. S. internal-revenue stamp, canceled Sept. 7, 1898. F. D. M., clerk.]
[5-cent U. S. internal-revenue stamp, canceled Sept. 7, 1898. F. D. M., clerk.]

[Endorsed:] No. —. U. S. circuit court of appeals for the ninth circuit. Certified copy of order. Filed ——, 189–. ——, clerk.

Endorsed on cover: Case No. 17,040. U. S. C. C. of appeals, 9th circuit. Term No., 153. Willis Thorp, plaintiff in error, *vs.* S. A. Bonnifield *et al.* Filed October 25th, 1898.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

Filed May 20, 1899.

Supreme Court, U. S.
FILED
MAY 20 1899
JAMES H. MCKENNEY,
Clerk.

WILLIS THORP,
Plaintiff in Error,
vs.
S. W. BONNIFIELD AND JOHN G. HEID,
Defendants in Error.

No. 455

Brief of Plaintiff in Error Against Motion of Defendants in Error to Dismiss Appeal.

J. T. RONALD,
Attorney for Plaintiff in Error.

Pigott & French Co., Printers, 104 W. Washington St., Seattle, Wash.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

WILLIS THORP,
Plaintiff in Error,
vs.
S. W. BONNIFIELD AND JOHN G. HEID,
Defendants in Error.

No. 455

Brief of Plaintiff in Error Against Motion of Defendants in Error to Dismiss Appeal.

The learned counsel for defendants in error have unintentionally erred in their recitation of facts, set forth in their motion to dismiss.

Counsel state that "the cause was tried in the United States District Court for the District of Alaska, by stipulation of the parties, without a jury."

There was no stipulation of parties that the cause should be tried without a jury; neither was there a trial of the cause either with or without a jury. The fact that there was no trial is the very thing complained of by plaintiff in error.

The defendants in error commenced an action at law in the District Court of the United States for the District of Alaska, on the 15th day of April, 1895, against the plaintiff in error, to recover certain moneys alleged to be due under the terms of a certain indenture of lease of certain mining properties situated in the District of Alaska.

A demurrer to the complaint was overruled, and judgment by default was entered against the plaintiff in error in February, 1897.

The plaintiff in error moved to vacate and set aside the default judgment, which motion was denied, whereupon he sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, holding terms at San Francisco, and defendants in error filed a motion in said Circuit Court of Appeals to dismiss the writ of error on the ground and for the reason that the Circuit Court of Appeals had no jurisdiction to review decisions of the District Court of the United States, for the District of Alaska, in cases of this character.

On the 21st of October, 1896, the Circuit Court of Appeals arrested the determination of this cause upon its merits and certified it to this Court for the purpose of receiving the instructions of this Court for its proper decision upon the question of jurisdiction of said Circuit Court of Appeals to hear and determine this cause upon its merits. This Court answered the question in the negative, and its mandate was spread upon the records of said Circuit Court of Appeals on the 3rd of January, 1898.

On or about July 8, 1898, Congress passed an Act, entitled: "An Act providing for the transfer from the Circuit Court of Appeals for the Ninth Circuit, to the Supreme Court, of certain appeals from the District Court of Alaska." Whereupon the record of this case was transmitted by the Clerk of the Circuit Court of Appeals at San Francisco, to this Court.

In addition to the portion of the record printed and set forth in the brief of the learned counsel for the defendants in error on this motion, such other portions of the record as is deemed by plaintiff in error to be necessary upon the decision of this ~~Court~~ motion is printed and set forth in this brief. Ex. A. Post.

ARGUMENT.

The able counsel for the defendants in error base their motion to dismiss upon two grounds:

I.

That this Court has no jurisdiction to consider this case because the same was brought here by writ of error instead of by appeal.

II.

The invalidity or unconstitutionality of the Act of July 8th, 1898, aforesaid.

We will discuss these in their order.

I.

Want of jurisdiction of this Court to consider this case because the same was brought here on *writ of error* instead of by *appeal.*

This we oppose on three grounds:

1st. Defendants in error are estopped from urging this ground at this time as the same is not one of the grounds urged by defendants in error upon their motion to dismiss in the Circuit Court of Appeals.

The only ground therein urged being, not that the case was brought up on writ of error, but, that an appeal would not lie from the said Alaska Court to the said Circuit Court of Appeals.

2nd. Assuming the Act of April 7, 1874 (18 St. at L., 27) to be applicable to appeals from the District Court of Alaska, it is not applicable to the facts in this case,

for the reason that this was not a trial by the Court without a jury. In fact it was not a *trial* at all. The case cited by the learned counsel for defendants in error, viz., *Gregory Consol. Mining Co vs. Starr,* was a case *tried* by the Territorial Court of Montana without a jury.

We take it that the act has regard to an action at common law, in which the Court has heard and determined the case upon the facts by stipulation of the parties, without a jury, or has decided the same upon an issue of law. Such is not the status of this case.

3rd. But we contend that the Act of April 7th, 1874, does not cover or have application to appeals from the Court in Alaska for the following reasons:

The Act, or so much thereof as is deemed applicable, reads as follows:

> "Whereas, by the organic acts establishing several of the Territories of the United States, it is provided that certain courts thereof shall have common-law and chancery jurisdiction, and doubts have been entertained whether said jurisdictions must be exercised separately, or whether they may be exercised together in the same proceeding, and whether the codes and rules of practice adopted in said Territories which have authorized a mingling of said jurisdictions in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, are repugnant to the said organic acts respectively: Therefore,
>
> *Be it enacted, etc.,* That it shall not be necessary in any of the courts of the several Territories of the United States to exercise separately the com-

mon-law and chancery jurisdictions vested in said Courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby validated and confirmed:

Provided, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

Sec. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe."

Now Alaska has never been considered one of the organized territories of the United States.

Let us examine the various Acts of Congress relating to Territories.

By Act of September 9, 1850 (9th St. at L., 447), a certain circumscribed region is "erected" into a temporary government by the name of New Mexico.

By Act of same date (9th St. at L., p. 453) a certain circumscribed region is "erected" into a temporary government by the name of Utah.

By Act of March 2, 1853 (10th St. at L., p. 172), a certain circumscribed region is "organized" into a temporary government by the name of the Territory of Washington.

By Act of February 28, 1861 (12th St. at L., 172), a certain circumscribed region "is erected" into a temporary government by the name of the Territory of Colorado.

By Act of March 2, 1861 (12th St. at L., 239), a certain circumscribed region "is organized" into a temporary government by the name of the Territory of Dakota.

By Act of February 24, 1863 (12th St. at L., p. 664), a certain circumscribed region "is erected" into a temporary government by the name of the Territory of Arizona.

By Act of March 3, 1863, (12th St. at L., p. 808), a certain circumscribed region "is created" into a temporary government by the name of the Territory of Idaho.

By Act of May 26, 1864 (13th St. at L., p. 85), a certain circumscribed region "is created" into a temporary government by the name of the Territory of Montana.

By Act of July 25, 1868 (15th St. at L., p. 178), a certain circumscribed region "is organized" into a tem-

porary government by the name of the Territory of Wyoming.

Thus stood the Acts organizing the territories, and the organized territories up to a date as late as July 25, 1868, and subsequent to the acquisition of Alaska.

In every one of these Acts Congress either *erected, created* or *organized* a certain region into a temporary government under a certain name. In every one of these territories certain territorial courts were created. A territorial government was provided, and the territoria l legislatures were invested "with power over all rightful subjects of legislation, etc."

From every one of the territorial Supreme Courts thus created *writs of error,* and *appeals* were allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United Ctates.

Now, this means that in common-law actions the case was removable to the Supreme Court on *writ of error,* while in equitable proceedings, by *appeals.*

This was the law relating to territorial courts and proceedings, and these were the organized Territories up to July 25, 1868. Two days later, July 27, 1868 (15th St. at. L., 240), an Act of Congress was passed whereby the laws of the United States relating to customs were extended to all "The territory ceded to the United States by the Emperor of Russia."

Now Congress at that time did not consider this vast domain as a Territory in the sense in which it considered or regarded the Territories above mentioned. It was more in the nature of an outlying province or a district. It created no territorial form of government. No court was provided for it, but on the contrary it declared that "until otherwise provided by law, all violations of the customs regulations, and of all of the laws by said Act extended to Alaska, and committed within Alaska, shall be prosecuted in any District Court of the United States in California, or Oregon, or in the District Courts of the Territory of Washington."

Thus stood the law up to the date of the compilation of the Revised Statutes of the United States, wherein Title XXII, Chap. 2, is titled: "Provisions concerning particular organized territories." Under this Chapter are provisions relating to the organized Territories above mentioned.

The next Chapter, viz., Chap. 3, is titled: "Provisions concerning the unorganized territory of Alaska," and contains provisions relating solely to said unorganized territory, thus evincing the intention, interpretation and understanding of Congress at that date of a distinction between Territories, so called, and the tract or province or territory ceded to the United States by Russia. Now, the distinction between Territories proper and this ceded area standing thus at the date of this Act of April 7, 1874, let us analyze said act and ascertain whether

it was intended to be an Act applicable specially to the organized Territories as they then existed, or whether it was to be construed as covering then or at any future time any other Territory thereafter to be organized, or especially Alaska.

The first line of the preamble recites, that "Whereas, by the organic acts establishing *several* of the Territories of the United States.' This certainly must refer to the several Territories theretofore established, and not to the unorganized Territories not yet established.

Continuing, the preamble recites: "It is provided that certain courts thereof shall have common-law and chancery jurisdiction."

Now this language refers only to the Territories so organized, as in no other Territory was a Court organized.

Again, continuing, said preamble recites: "Doubts have been entertained * * * whether the codes and rules of practice adopted in said Territories * * * are repugnant to said organic acts respectively," showing plainly that it was applicable only to the Territories then organized by *"said organic acts,"* neither of which acts included then, or thereafter, Alaska, which, as yet, has never been the subject of an *"organic act."*

Then section 1 provides, "That it shall not be necessary in any of the Courts of the several Territories of the United States to exercise separately the common-law and

chancery jurisdictions vested in *said* Courts; and that the several codes and rules of practice adopted in *said* Territories respectively, etc., etc.," showing conclusively that the Act was especially applicable to the Territories then organized, which were referred to as *said* Territories with *said* Courts.

Now Sec. 2, being the section on which the learned counsel rely, reads: "That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, etc., etc."

Now by the use of the words *'said Territorial Courts,'* Congress referred to and meant the Territories above mentioned as organized at that time, and having Territorial Courts, and did not refer to the unorganized Territory ceded to the United States by the Emperor of Russia.

We apprehend counsel will concede that at the date of the Act it had no reference to the unorganized Territory of Alaska, but will contend that it covers and is applicable to appeals from said Alaska Court upon the creation of a court in Alaska.

Various acts have been passed by Congress relating specifically to Alaska, but the first attempt at providing any semblance of civil government for Alaska is by Act of May 17, 1884 (23 St. at L., 24). Now, a close examination of this statute reveals that Congress has

neither *erected, created* or *organized* any circumscribed region here into a temporary government under any particular name, as was the practice in the case of the Territories heretofore referred to; but recognizing that there existed a vast area or province known as Alaska, which was becoming more or less populous and requiring some legal restraint or regulations, provided, in the first section "That the Territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, shall constitute a *civil* and *judicial District,*" (italics our own) and further provides that it shall be governed as in that Act provided. Mark the language. No Territory is *created, erected* or *organized*, but that vast unexplored, unestablished region shall constitute a "*civil* and *judicial* district," which shall be governed, not like an organized Territory, but, solely by Congress as in the Act provided. (not by act of 1874)

Sec. 2. "A governor shall be appointed who shall be charged with the interest of the United States Government that may arise within said District," manifesting plainly the intention of Congress that the only interest in said District would be the interest of the United States; very unlike a Territorial government.

The governor shall see that laws enacted for the District by Congress are enforced and also that officials appointed to administer the laws are faithful to their trust. No officers are appointed except by the United States Government, and there are no laws to enforce except the laws of Congress.

The President has the power to annul reprieves, or any other act of the Governor.

Section 3 of the Act establishes a "District Court for said District with the civil and criminal jurisdiction of District Courts of the United States, and District Courts of the United States exercising the jurisdiction of Circuit Courts."

Now the Court established in this unestablished Territory is a District Court for the District. It is not a Territorial Court. It could not properly be a Territorial Court, until a territory is established. The jurisdiction of the Court may be altered by Congress at any time.

By Section 4, the Clerk of the Court is *ex officio* Secretary and Treasurer of the District, and all moneys shall be accounted for to the Secretary of the Treasury of the United States. This system is absolutely the opposite of a Territorial Government. There is no county organization whatever.

Section 7 enacted that the general laws of Oregon in force at that time shall be the law in said District, so far as the same were applicable, etc., and it was further provided that *writs of error* in criminal cases should issue to the said District Court from the United States Circuit Court for the District of Oregon, but the final judgments or decrees of said Circuit Court for Oregon or of said District Court for the District of Alaska "may be

reviewed by the Supreme Court of the United States as in other cases."

Now this puts the Circuit Court of Oregon and the District Court for the District of Alaska on the same plane or basis, so far as the removal of cases therefrom to the Supreme Court is concerned; they are removable to the Supreme Court *"as in other cases," i. e.,* a *writ of error* or *appeal* is had from the Alaska Court in case where the *writ* or *appeal* would lie from the Circuit Court.

It will not be contended that an action at law could be transferred from the Circuit Court or any iDstrict Court of the United States to the Supreme Court, except by writ of error, and under this Act final judgments or decrees are removed from the District Court for the District of Alaska, to the Supreme Court, *as in other cases.*

It is the purpose and intention of the Act that the District Court for the District of Alaska is a District Court of the United States, for a certain unorganized region, and not peculiarly a Territorial Court in the sense of the term "Territorial Court" as applied to the organized Territories.

We are aware that this Court has held that the District Court for the District of Alaska is the Supreme Court in said District. Our contention is not inconsistent at all with said holding. Admitting that it is the highest Court, or the Court of final resort in said Alaska, it does not follow that it is a Territorial Court of the

same nature, governed by the same rules, as the Territorial Courts of the organized Territories. It is a creature entirely of the Act of Congress. Its jurisdiction may be altered from time to time only by Act of Congress, whereas, a Territorial Court proper is subject to alteration as to its jurisdiction, etc., from time to time by the Territorial Legislature.

Again, the same Act in section 8 declares that the District of Alaska is *created* a land District, so that Alaska would bear about the same relation to a Territory as a School District will to a County. It is more a quasi organization than anything else, with a Court established with jurisdiction co-extensive with a land district *created.*

Sec. 9 provides that there shall be no Legislative Assembly in the said District, nor shall any delegate be sent to Congress therefrom.

Again, in Section 13, the Secretary of the Interior shall make all needful provision for education of the children in Alaska, and section 14 of the Act specially recognizes and continues in force "Title XXIII, Chapter 3, of the Revised Statutes of the United States, relating to the unorganized Territory of Alaska;" showing conclusively it to have been the intention of Congress that Alaska, with this *quasi provincial form of government* is not to be considered as one of the Territories, but still as an unorganized Territory, without the powers of an organized Territory.

Therefore, we contend that the Act of April 7, 1874, is applicable only to the Territorial Courts of the Territories of the United States as then organized, and that it did not cover and apply to, nor gather within its provisions, the Court created by the Act of 1884 for the District of Alaska; that this Court in Alaska is peculiar in its nature, and is a Court *sui generis* for maintaining order in a district not having a republican form, but a provincial form, of government.

Further, and as touching this point, the plaintiff in error respectfully suggests to this Court, that since the organization of this District Court, for the District of Alaska, the practice has been universal that removals from said District Court to the Appellate Court were governed by the same rules and regulations as in cases of removal from the Circuit and District Courts of the United States, viz., by writ of error in common-law actions, and by appeal in other cases; that plaintiff in error procured his *writ of error* in the utmost good faith, in pursuance of the universal practice theretofore obtaining, and reliance that such long, unbroken and continued course was proper in the premises; and in view of this fact, and of the further fact that the proposition of the learned counsel for defendants in error must cetrainly not be free from doubt, we submit that this appeal ought not to be dismissed, because of the first ground urged by the defendants in error.

And as further evidencing the understanding or inter-

pretation of Congress itself of this in the same sense, we respectfully refer to Section 202, of Title II, Chapter 21, p. 62, of the recent Act of Congress, prescribing a criminal code of Alaska, which section provides that "appeals and writs of error in criminal actions may be taken and prosecuted from the decisions and judgments of the District Court of the District of Alaska to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, in the same manner and under the same regulations as from the Circuit and District Courts of the United States under the Acts of Congress now in force or that may be hereafter enacted." We further suggest that Congress in this Act does not refer to Alaska as the Territory of Alaska, but simply provides for the punishment of crime in the "District of Alaska," and title the Court "District Court of the District [not Territory] of Alaska."

II.

The second ground for dismissal of the writ argued by the learned counsel for defendants in error is that this Act of July 8, 1898, is a retroactive law, and that it is unconstitutional and void because of

"1st. Its interference with the powers of the judiciary; and

2nd. It impairs vested rights."

We do not know the date of its passage.

If the fact of the defendant in error's having procured

execution and sale of property thereunder carries any weight upon this proposition, it seems to us it is overbalanced by the further fact that before his sale the bill which finally became a law was introduced and pending in Congress. Any action of his was subject to the power of Congress to legislate concerning the matter.

The Act provides that appeals pending in the Circuit Court of Appeals of San Francisco from Alaska prior to the 30th of December, 1897, of which the Supreme Court of the United States would have had jurisdiction under the then existing law, be, and the same are deemed and treated as regularly filed on appeal in the Supreme Court of the United States, as of date when filed in the Circuit Court of Appeals.

This appeal was pending on the 30th of December, 1897.

Here was an act of the plaintiff in error toward appealing his case. By mistake or inadvertence and believing that the *Coquitlam* case authorized it, his papers were deposited in the wrong office. Congress by this Act sought to give effect to the act or appeal of the plaintiff in error, and all other appellants from the Alaska Court, by providing that the appeals so taken should be considered as taken to this Court. It seems to us that Congress had power to make such a provision.

The able counsel in his argument insists that this Act could not be operative after the right of appeal had been

forfeited and lost. What is there before this Court to show that the right of appeal from the Court of Alaska to this Court direct was forfeited? The time within which an appeal may be had was the time prescribed by the laws of Oregon, in force in 1884. There is nothing in this record to show the Court that the time for an appeal direct to this Court had expired at the date of the passage of the Act in question.

But aside from this, we think the proposition of law asserted by counsel, viz., that Congress has not power to pass a retrospective statute, is not the law.

The Constitution of the United States, in Article I., Sec. 9, fixes certain limitations to the powers of Congress, among which is not the limitation of its power to pass a retrospective statute.

It will be conceded that Congress has power to make "all needful rules and regulations respecting the territory belonging to the United States."

There is no sovereignty in Alaska. The acts of Congress are not only the Supreme laws, but are the only laws of Alaska.

We concede that the highest Courts of many of the States have held that the State legislatures have not the power to pass retroactive laws which impair the obligation of contracts, but we contend that even states are not prohibited from passing laws retroactive in operation, and not impairing the obligation of contracts, or partak-

ing of the nature of *ex post facto* laws, "no matter how seriously it may affect vested interests, or how obnoxious it may be to every principle of sound and wholesome legislation."

Black on Const. Prohibitions, Sec. 171, where is also laid down the rule that any limitation upon the power of the several states in this respect must be sought for in the Constitution of the particular State, as is the case in the Constitution of Texas, from which some of the cases cited by the learned counsel came.

But we contend that the Act of Congress in question is not prohibited by the United States Constitution.

This Act was in fact no more than an Act extending the time for appeal, or give effect to an attempted appeal which Congress certainly had power to pass.

Congress having the power to provide in the first place that an appeal should be made ot the Circuit Court of Appeals or to this Court, by filing papers with the Circuit Court of Appeals, it certainly has power to ratify what was done in good faith by the plaintiff in error in this respect, and we think that is practically all Congress has done.

One of the earliest cases decided by this Court is that of *Calder et wife, vs. Bull, et wife,* 3rd Dall., 386, in which Justice Chase renders, what appears to our minds to be, a lucid and clear discussion of the principle involved, from which we quote *in extenso:*

"The Legislature of Connecticut on the second Thursday of May, 1795, passed a resolution or law which, for the reasons assigned, set aside a *decree* of the *Court of Probate for Hartford* of the 21st of *March*, 1793, which decree *disapproved* of the will of Normand Morrison (the grandson) made the 21st of *August*, 1779, and refused to *record* the said will; and granted a new hearing *by the said Court of Probate*, with liberty of appeal therefrom in six months. A new hearing was had, in virtue of this resolution or law, before the *said Court of Probate*, who, on the 27th of *July*, 1795, *approved* the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the Superior Court at Hartford, who at February term, 1796, *affirmed* the decree of the Court of Probate. Appeal was had to the Supreme Court of Errors of Connecticut, who in June, 1796, adjudged *that there were no errors*. More than eighteen months elapsed from the decree of the Court of Probate (on the 1st of March, 1793), and thereby Caleb Bull and wife were barred of all right of *appeal*, by statute of Connecticut. There was no law of that State whereby a *new* hearing, or trial, before the said Court of Probate might be obtained. *Calder and wife* claimed the premises in question, in right of his wife, as heiress of N. Morrison, physician; *Bull and wife* claim under the will of N. Morrison, the grandson. The counsel for plaintiffs in error contend that said resolution or law of the legislature of Connecticut, granting a *new hearing*, is an *ex post facto* law, prohibited by the Constitution of the United States." Continuing, the Court says: "The *effect* of the resolution or law of Connecticut above stated, is to *revise* a decision of one of its Inferior Courts, and to direct a *new* hearing of the case by the *same Court of Probate* that passed a decree *against* the will of Normand Morrison. By the *existing* law of Connecticut a *right to recover certain property* had vested in *Calder and wife* (the appellants) in consequence of a decision of a *Court of Justice*, but, in virtue of a subsequent resolution or law *and the new hearing thereof*, and the decision in consequence, this right to recover certain property

was divested, and the right to the property declared to be in Bull and wife, the appellees."

The learned Justice then, after discussing the restrictions laid by the Constitution of the United States upon the States, says:

"All the restrictions contained in the Constitution of the United States on the power of the State Legislatures, were provided in favor of the authority of the Federal Government."

And further in speaking on the nature of *ex post facto* laws, and to the effect that they are applicable to criminal laws merely, the learned Justice says:

"I do not think it was inserted to secure the citizen in his *private rights*, of either *property, or contracts.*" * * * "In my opinion the true distinction is between *ex post facto laws* and *retrospective laws.* Every *ex post facto* law must necessarily be *retrospective;* but every *retrospective* law is not an *expost facto* law; the former only are prohibited. Every law that takes away, or impairs, *rights vested,* agreeably to *existing laws,* is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no *retrospect;* but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement. They are certainly *retrospective,* and literally both *concerning, and after, the facts committed.* * * * Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations, is *retrospective.* But such laws may be proper or necessary, as the case may be. * * * In the present case, there is no fact done by *Bull* and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut. It does not *concern,* or *relate* to, any act done by them. The decree of the *Court of Probate of Hartford* (on the 21st, March)

in consequence of which *Calder* and wife claim a right to the property in question, was given *before* the said new law or resolution and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing and the decision in favor of the will, they have lost, what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The *decree of the Court of Probate* is the only *fact,* on which the law or resolution operates. In my judgment the case of the plaintiffs in error, is not within the *letter* of the prohibition; and for the reasons assigned, I am clearly of the opinion, that it is not within the *intention* of the prohibition. * * * It was further urged, that if the provision does not extend to prohibit the making *any law after a fact,* then *all choses in action;* all land by *Devise;* all personal property by bequest, or distribution; by *Elegit;* by execution; by judgments; will be unprotected from the legislative power of the States; *rights vested* may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass *no law to deprive a citizen of any right vested in him by existing laws.* * * * The restraint against making any *ex post facto* laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a *vested right to property.*"

Mr. Justice Patterson delivers a separate opinion in the case just cited, in which he holds that the power of granting new trials was by previous law in Connecticut imparted to the Superior and County Courts, but that "does not remove or annihilate the pre-existing power of the Legislature in this particular; it only communicates to other authorities a concurrence of jurisdiction, as to the awarding of new trials."

Mr. Justice Iredell likewise renders a separate opinion, in which he uses the following language:

"The authority to declare an act void is of a delicate and awful nature, and the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion), had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid."

Therefore, this does not impair the obligation of any contract (even conceding for the sake of argument, that Congress has not power to pass a law impairing the obligation of a contract). It merely relates to or affects an act or a decision of the Circuit Court of Appeals, in like manner as the Act in the case above cited related to and affected the decision of the Probate Court.

Hence, we say that Congress, which has the power to establish inferior courts of justice for Alaska, and provide for the appointment of judges, and to make all

regulations for the administration of justice within Alaska, and which also has the power to alter or change this jurisdiction from time to time, certainly possesses the power to pass an Act, the effect of which is either to grant a new trial or to ratify or perfect a defective appeal.

"The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the Nation shall direct."

Sturges vs. Crowninshield, 4 Wheat. 200;
Mason vs. Haile, 12 Wheat, 374;
Satterlee vs. Mattheson, 2 Peters, 380.

In this case Satterlee and Mattheson held land in Pennsylvania in common under a Connecticut title. A division having been made between them, Satterlee became tenant of Mattheson of his part of the land set off in severalty. Satterlee afterwards obtained a Pennsylvania title to the land leased to him by Mattheson, and Mattheson brought suit in ejectment. The lower Court held that Satterlee was estopped to set up title against his landlord, but the Supreme Court held "that the relation between landlord and tenant could not exist between persons holding under a Connecticut title;" and awarded the land to Satterlee. This decision was in 1825. In the following year the Pennsylvania Legislature enacted: "That the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut

settlers and Pennsylvania claimants as between other citizens of the commonwealth."

The suit was brought on again, and Mattheson, by virtue of this enactment, recovered the land. On appeal to this Court the Act was attacked as being repugnant to the Constitution of the United States, "because it impairs the obligation of the contract; because it creates a contract between parties where none previously existed by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff."

This Court censures the laws as "an unwise and unjust exercise of legislative power," but held, nevertheless, that it does not impair the obligation of a contract, and that

> "It is a retrospective act, but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. * * * The objection, however, which was most pressed upon the Court, and relied upon by counsel for plaintiff in error, was that the effect of the Act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this or of any Circuit Court, which has condemned such a law upon this ground; provided its effect is not to impair the obligation of a contract."

Wilkinson vs. Leland, 2 Peters, 627.

This was an action to recover real estate. Plaintiffs were heirs of one Jenckes, who at the time of his death

resided in New Hampshire, but left real estate in both New Hampshire and Rhode Island. The will was probated in New Hampshire. The executrix in 1790 obtained a license from the Probate Court of New Hampshire to sell real estate to pay debts. The will was never proved or administration taken out in Rhode Island. The executrix, in 1791, sold the premises in Rhode Island to the grantors of Wilkinson. In 1792, the Legislature of Rhode Island passed an Act ratifying and confirming the sale. Plaintiffs below devisees of Jencks attack this Act as unconstitutional, and recovered the land. Upon appeal this Court held:

"The sale made by the executrix [to defendant's grantors] in virtue of such license, was totally void; and the deed given thereupon was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity. * * * To all that has been said at the bar upon the danger, inconvenience and mischiefs of retrospective legislation in general, and of Acts of the character of the present in particular, this Court has listened with attention, and felt the full force of the reasoning. It is an exercise of power which is of so summary a nature, so fraught with inconvenience, so liable to disturb the security of titles, and to spring by surprise upon the innocent and unwary to their injury, and sometimes to their ruin, that a Legislature invested with the power can scarcely be too cautious or too abstemious in the exertion of it."

The Court then, after holding that the devisee of Jenckes took a vested estate in fee in the lands in Rhode Island, held that this act is not unconstitutional. Continuing further, the Court says:

"The only question then is, what is the intent of the Legislature in the Act of 1792? Is it merely to confirm a void act, so as to leave it void; that is, to confirm it in its infirmity? or is it to give general validity and efficacy to the thing done? We think there is no reasonable doubt of its real object and intent. It was to confirm the sale made by the executrix, so as to pass the title of her testator to the purchasers."

Hence we submit, under the authority of the above case, the Act of Congress in question here was to give general validity and efficacy to the thing done by Thorp, viz., to his *bona fide* act of appeal, which, under the decision of this Court in the *Coquitlam* case, he was fairly justified in believing should have been in the first instance to the Circuit Court of Appeals.

Watson, et al., vs Mercer, et ux., 8 Peters, 88.

The facts in this case are these: May 8, 1785, Mercer and wife, executed a deed to the premises (then being the separate property of the wife) to a trustee, who on the same day reconveyed the property to Mercer, the object being to vest the estate in the husband. The certificate of acknowledgment of the deed to the trustee did not comply with the law then in force. In April, 1826, or forty-one years after the deed, the Pennsylvania Legislature passed an Act, the object of which was to cure all defective acknowledgments. Plaintiffs in ejectment claim title under the husband, and the defendants claim as heirs at law of the wife. The deed had been previously decreed void for defective acknowledgment, and plaintiffs in error, as heirs of wife, let into possession.

Ejectment was brought against them after the passage of the Act of 1826. Judgment was rendered for the plaintiffs below in 1832. Upon appeal this Court says:

"The argument for the plaintiffs in error is, first, that the Act violates the Constitution of the United States, because it divests their vested rights as heirs at law of the premises in question; and 2d, that it violates the obligation of the contract. * * * As to the first point, it is clear that this Court has no right to pronounce an Act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of he United States does not prohibit States from passing retrospective laws generally, but only *ex post facto* laws. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private right retrospectively."

Charles River Bridge vs. Warren Bridge, 11 Peters, 423.

See also *Bronson vs Kinzie, et al.,* 1 Howard, 331, 332, wherein this Court decided a question similar to the principle involved herein, and after reviewing the case of *Satterlee vs. Mattheson, supra,* say:

"Here was a direct legislation not only on existing rights growing out of contracts, but such an effect was given to the law as to divest vested rights. And yet this act was held not to be in violation of the Constitution of the United States. What vested right is there or can there be, in the nature of things, in the holder of a contract to the particular remedy for its enforcement which existed at its date? but if there were such a vested right as to the remedy, which there is not, it may, under the above

authority, be devested by law. If the decision do not mean this, it means nothing. * * * But the remedy for the enforcement of the contract being established by the law-making power, may be modified at its discretion. This is admitted as regards subsequent contracts, but the same rule applies to prior ones. So far as the mere remedy is concerned, in my judgment, no sound and practical distinction can be drawn between prior and future contracts."

See also

B. & S. R. R. Co. vs. Nesbit, 10 How., 395.

In this last case an Act of the Legislature of Maryland, incorporating the Railroad Company, provided for an inquisition to condemn land for corporate purposes, which condemnation should be confirmed by the Court. Inquisition was held December 13, 1836, upon the Nesbit land, and the order of confirmation by the Court entered April 24, 1837. The Act provided that upon the confirmation by the Court the Railroad Company might pay the appraised value and acquire the land. In 1841, and before the payment of the appraised valuation, the Legislature of Maryland passed a statute directing "That the Court should set aside the inquisition found and direct inquisition *denovo.*" Upon petition of the owners of the land the Court, April 26, 1844, entered a rule upon the Railroad Company to show cause, etc., and upon May 13, 1847, ordered that the inquisition be set aside, and that the Court would proceed to hear the application *denovo.* The Railroad Company replied, and one of the grounds urged was that the title to the land condemned

having vested by the confirmation of the inquisition, and tender of the money anterior to the judgment setting it aside, the Act of 1841 was unconstitutional "because it divested vested rights." This Court decided in favor of "the authority or practice of the State Legislature in awarding a new trial or in ordering a proceeding in the nature of an appeal after litigation actually commenced, or even after judgment. * * * That there exists a general power in the state government to enact retrospective and retroactive laws, is a point too well settled to admit of action at this day."

"That a statute is not void because it is retrospective, has been repeatedly held by this Court. * * * It is one of the contingencies to which parties look now in making a large class of contract, that they may be affected in many ways by State and National Legislation."

Curtiss vs. Whitney, 13 Wall., 68;
Lock vs. New Orleans, 4 Wall., 172.

The Courts are not at liberty to declare a statute void, because, in their opinion, it invades the fundamental principles of civil liberty, or violates the maxims of republican government, unless those principles are declared and guaranteed by the Constitution; nor because the Act is opposed to the spirit of the Constitution.

Cooley, Const. Lim., 164, *et seq.*

So in Tennessee, the Supreme Court held:

"It is not for the judiciary to inquire whether the Legislature has violated the genius of the government, or the

general principles of liberty and the rights of man, or whether their acts are wise and expedient or not; but only whether it has transcended the limits prescribed for it in the Constitution. By these alone is the power of that body bounded; that is the touch-stone by which all its acts are to be tested."

Louisville, &c. R. R. vs. County Court, 1 Sneed, 687;

Sharples vs. Mayer, &c., 21 Penn. St., 147, 161;

Commonwealth vs. MacCulsky, 2 Rawle., 369, 374;

Bridgeport vs. Railroad, 15 Conn., 475, 497.

"Statutes, if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not effect their substantial rights, cannot be obnoxious to the charge of usurping judicial power, etc."

Cooley, Const. Lim., 107.

The cases cited by the learned counsel in support of his proposition that this act was an interference with the powers of the judiciary, are somewhat ancient, the latest one being *13 Minn.* That citation is not applicable. In that case, it appears that the time for appeal had expired, and the appellant *had made no effort* to perfect an appeal within the time, and it acocrdingly held that the act of the Legislature in so far as it gave him a right to

appeal after the expiration of such a right, was unconstitutional. That case, however, differs from the case at bar, in two particulars, first, there is nothing in this record from which it can appear that the time for the appeal of the appellant herein had expired at the passage of the law in question; second, assuming, however, that the time had expired, it is not denied that appellant did do an *act looking toward perfecting his appeal* within the time. Now all the statute has done in this case was to give efficacy to that act, which, by reason of some informality had not yet perfected the appeal. But we find in Minnesota a case in point, being *Converse vs. Burrows, 2 Minn., 229*, which case has been approved by the Supreme Court of Minnesota in *2 Minn., 201; 4 Minn., 375; 4 Minn., 430; 6 Minn., 386; 12 Minn., 486.*

See also, on same proposition,

Prout vs. Berry, 2 Gill., 147;

State vs. Northern Cen. R. R., 18 Md., 193.

We submit, if this *2 Minn.* case had not been the law applicable to the state of facts in that case it would have been expressly overruled in the *13 Minn.* We take it that the Court in rendering its decision in *13 Minn.* recognized the distinction between the cases.

Now, if it is competent for the Legislature to cure or perfect a defective deed or acknowledgment of a citizen, it is likewise competent for it to cure or perfect an imperfect or irregular appeal.

III

We further submit, as an additional reason for denying the motion to dismiss, that defendants in error by their general appearance, have waived their right to urge the grounds now raised for dismissal of this appeal.

Upon the foregoing we submit that the motion to dismiss should be denied and this case be heard finally upon its merits.

Respectfully submitted,

J. T. RONALD,

Attorney for Plaintiff in Error.

EXHIBIT "A."

COPY OF RECORD AS TAKEN FROM BILL OF EXCEPTIONS.

"And afterwards, to-wit, on the 3rd day of December, 1895, the following further proceedings were had and appear of record in said cause, to-wit:

S. A. BONNIFIELD, ET AL.,
vs.
WILLIS THORP. } No. 439.

ORDER OVERRULING DEMURRER.

Come now the parties hereto, by their respective attorneys and defendant's demurrer to plaintiffs' complaint coming on to be heard and the Court being sufficiently advised in the premises, overrules said demurrer, to which ruling of the Court the counsel for the defendant excepts, and defendantis given until Monday, December 23, 1895, to file his answer to said complaint.

And afterwards, to-wit, on the 26th day of December, 1895, the plaintiffs filed a Motion for Judgment, which is in words and figures following, to-wit:

In the United States District Court, for the District of Alaska.

S. A. BONNIFIELD AND JOHN G. HEID, *Plaintiffs,* vs. WILLIS THORP, *Defendant.*	No. 439.

MOTION FOR JUDGMENT.

Come now the plaintiffs in the above-entitled action, by Johnson & Heid, their attorneys, and move the Court for judgment for want of answer, for the reason that it appears from the record in this action that the defendant had been duly served with summons and has failed to answer the complaint of plaintiffs herein, and that the time for answering the said complaint has expired.

JOHNSON & HEID,
Attorneys for Plaintiffs.

And afterwards, to-wit, on said 26th day of December, 1895, the following further proceedings were had and appear of record in said cause, to-wit:

S. A. BONNIFIELD AND JOHN G. HEID,
vs.
WILLIS THORP. } No. 439.

ORDER FOR ENTRY OF DEFAULT.

The defendants having been duly served with the summons and complaint and having failed to answer the complaint, and the time for answering the complaint having expired and no answer having been filed with the Clerk of the Court within the time allowed by the Court,

Now, on motion of plaintiffs' attorneys, in open court, the default of the defendant is hereby entered.

And afterwards, to-wit, on the said 25th day of January, 1896, the following further procedings were had, and appear of record in said cause, which are in words and figures following, to-wit:

S. A. BONNIFIELD AND JOHN G. HEID,
Plaintiffs,
vs.
WILLIS THORP,
Defendant. } No. 439.

ORDER FOR JUDGMENT.

In this cause defendant's motion to open default, granted herein on December 26, 1895, having been sub-

mitted without argument by stipulation of parties, and the Court now being fully advised in the premises, denies said motion, and directs that judgment be entered for plaintiffs in accordance with the written opinion on file herein."

[redacted]

[redacted]

[redacted]

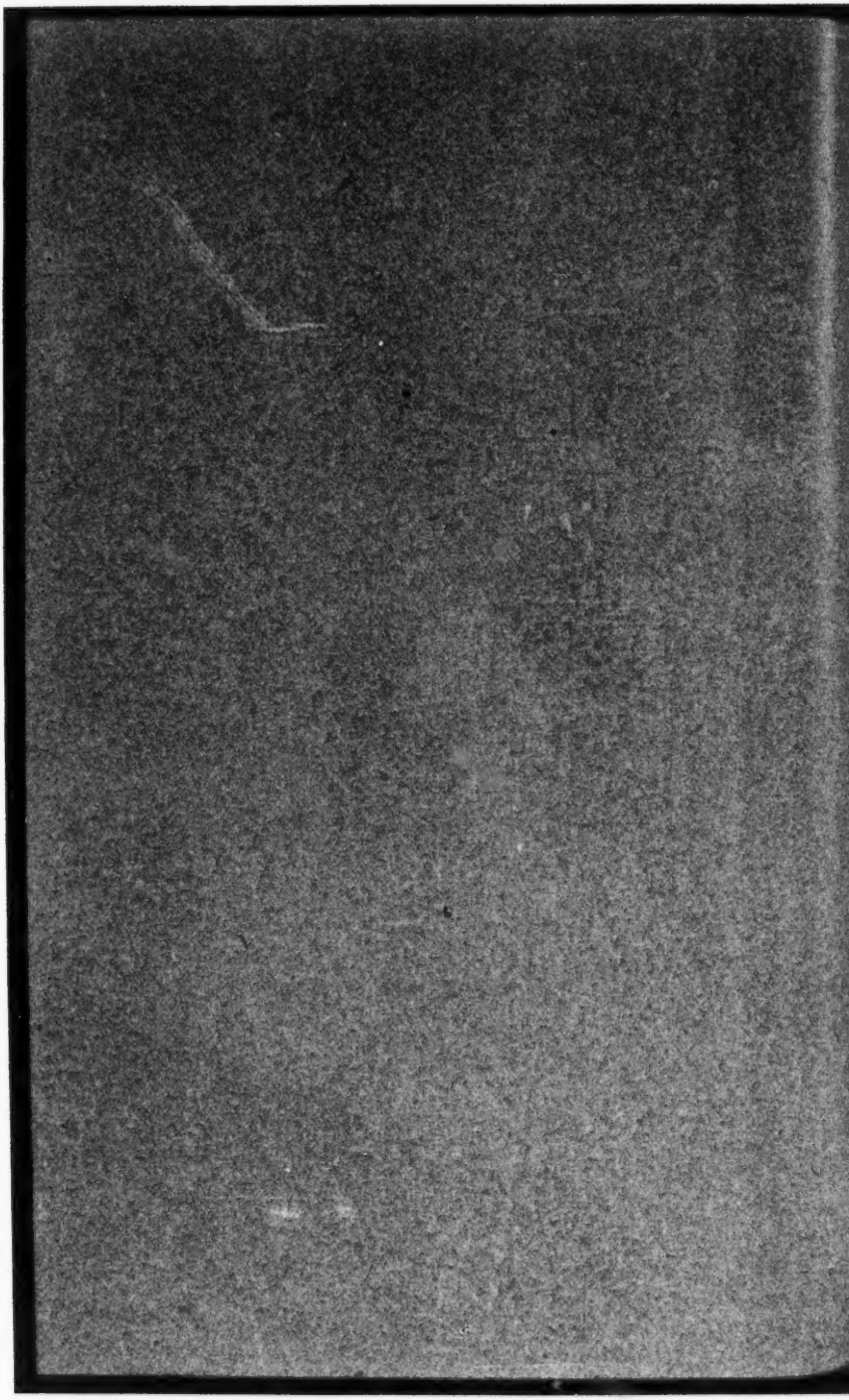
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WRIT OF ERROR TO THE DISTRICT COURT OF ALASKA

Brief of Plaintiff in Error

J. T. RONALD
Attorney for Plaintiff in Error

[redacted]



IN THE

Supreme Court of the United States

WILLIS THORP,
Plaintiff in Error,

vs. NO.....

S. A. BONNIFIELD and JOHN G. HEID,
Defendants in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF ALASKA

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

On June 25, 1894, the defendants in error, S. A. Bonnifield and John G. Heid, held a lease of a certain mining claim known as the "Aurora Lode Mining

Claim," in Alaska, with the right to work and mine the same and to extract ore therefrom until April 24, 1896. Robert Duncan, Jr., and J. Parker Corbus had a mortgage upon the claim for a sum aggregating, principal and interest, nearly $4,000.00.

These mortgagees caused a writ of injunction to issue prohibiting the lessees from removing ore from the mine.

Being unable to pay off the mortgage, or to operate the mine until payment of the mortgage should be provided for, they made certain arrangements with plaintiff in error, Willis Thorp, whereby said Thorp procured a release of the writ and received from defendants in error a transfer or assignment of the lease, with all the privileges and rights of defendants in error therein, for a term ending Dec. 31, 1894.

See Record, pp. 1 to 12.

The parties disagree as to the terms upon which Thorp was to operate the mine.

The defendants in error allege the agreement as to terms to be in writing.

See Exhibit D., Record, pp. 12-15.

This is not signed by Thorp; and the contract is de-

nied by Thorp in his answer tendered (Record, p. 73) to be hereafter referred to.

This action is brought by defendants in error against plaintiff in error to recover damages for alleged breach of contract by Thorp.

The obligation assumed and the breach wrought by Thorp, according to the contention of defendants in error, is set forth in the complaint as follows:

"The said Thorp did agree to pay said mortgage, * * * and to assume and pay all and every claim standing against or on account of said premises contracted by said Bonnifield and Runkle, at the date thereof.

That the said defendant, Thorp, further agreed to mine, work and operate said premises and after making all the payments in said lease mentioned, to-wit, the amount of said mortgage and debts contracted on account of said premises, was to retain for himself seven-sixteenths (7-16) parts of the profits or net proceeds arising from the operation of said mine and premises and to pay to these plaintiffs, S. A. Bonnifield and John G. Heid, the remaining nine-sixteenths (9-16) parts of the profits or net proceeds arising from said operation of said mine and premises in the proportion of 7-16 to Bonnifield and 2-16 to Heid.

That under and in accordance with said agreement and assignment of said lease the said Willis Thorp entered into possession of said premises and worked, mined and operated the same up to and until the 31st day of December, 1894, extracting and taking out therefrom, gold, of the value and amount of $32,000.00, and ore and concentrates, to the amount and value of $3,500.00, of which he disposed and sold the same.

That the cost and expense of working, mining, operating and extracting said gold and ore from said premises was $23,000.00, leaving a balance of profits or net proceeds of $12,500.00, of which the said Bonnifield and Heid were entitled to 9-16 part thereof.

That under said assignment and as a part of the expenses incurred in connection with said premises was the sum of $200, advanced and paid by the said Bonnifield and not repaid him from the earnings of said mine.

That the said defendant, Thorp, has failed and refused to pay said sums, or any part thereof, although often demanded."

See Record, pp. 3-5.

Thorp appeared in due time by his Attorneys Messrs. Bostwick & Crews, and moved for "an order requiring plaintiffs to make their complaint more definite and certain."

See Record, pp. 17-19.

This motion was granted, and defendants in error required to insert in their complaint the amount of the mortgage which they alleged Thorp assumed.

See Record, pp. 20-22.

Thereafter, in due time on May 23, 1895, Thorp's Attorneys interposed a general demurrer to the complaint.

See Record, pp. 22-23.

On December 3, 1895, this demurrer was overruled, and plaintiff in error allowed an exception and given until "Monday, Dec. 23, 1895, to file his answer."

On December 26, 1895, defendants in error, without notice to or service upon the attorneys of plaintiff in error, filed a motion for judgment for want of answer, and on the same day, without notice to or the knowledge of plaintiff in error, procured the entry of an order of default against plaintiff in error.

See Record, pp. 24-25.

That the parties and their attorneys all resided at Juneau, 180 miles distant from Sitka, where the motion was filed, and the default ordered, and connected with Juneau by a bi-monthly steamer only.

On Dec. 28, Attorneys for plaintiff in error moved to vacate and set aside said order of default (See Record, pp. 41-43), supporting the same by affidavit of mer-

its; (See Record, pp. 30-39) and at the same time served notice of calling up said motion on the 8th day of January thereafter, on the arrival of the first steamer at Sitka. See Record, pp. 39-41.

Counter affidavits were filed on behalf of defendants in error.

See Record, pp. 45-50.

The motion was duly presented, and on Jan. 25 the Court denied the motion to vacate and directed judgment for plaintiffs (defendants in error), and on the same day, without further notice, or the hearing or examination of any testimony whatever, judgment was entered against plaintiff in error in accordance with the prayer of the complaint.

See Record, pp. 68-69.

Four days later, to-wit, Jan. 29, plaintiff in error moved for an order vacating and setting aside this latter judgment, and for permission to file a verified answer, then and there tendered, (See Record, pp. 72-79) and promptly gave notice of calling the same up at the arrival of the next steamer in Sitka, about Feb. 9th. (See Record, p. 70.)

This application was supported by affidavits.

See Record, pp. 79-96.

Feb. 8th the Court entered the following:

"Order denying Motion to Vacate Judgment.

"In this cause, defendant's motion for an order setting aside the judgment granted herein on January 25, 1896, coming on regularly to be heard, plaintiff and defendant each being represented by counsel, and after hearing argument of counsel, and the Court being fully advised in the premises, denies said motion, but if there is a mistake in the computation as to the amount of judgment it may be corrected in that regard; and plaintiffs are given until the arrival of the next steamer, "City of Topeka," on or about February 25th, 1896, to file affidavit to show no error exists in said judgment, to which ruling of the Court the defendant at the time excepts."

See Record, p. 96.

No other or further order or ruling is ever made by the Court.

To the several rulings of the Court overruling the demurrer to the complaint, denying the motion for vacation of default, and ordering judgment against defendant in error *pro confesso;* denying the motion to vacate the judgment thus rendered and permit filing of answer, the defendant duly excepted, (See Record, pp. 132-142) and by writ of error brings the case to this Court (See Record, pp. 108-111) and assigns the following:

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The Court erred in over-ruling defendant's general demurrer to plaintiff's complaint.

II.

The Court erred in over-ruling defendant's default for want of an answer, for the reason that the plaintiffs never notified the defendant, or his counsel, by notice or otherwise, that they intended to apply for said default.

III.

The Court erred in refusing to set aside the default granted as aforesaid, upon the application and showing made by the defendant Willis Thorp.

IV.

The Court erred in granting judgment on said default:

First—For the reason that no proof was offered in support of the allegations in plaintiff's complaint.

Second—That there was no application or motion for judgment on said default filed by the plaintiffs and that the defendant had no notice of the intention of the plaintiffs to apply for, or the Court granting said judgment, and there was no application, in writing, by motion, or otherwise, asking for judgment on said default.

V.

The Court erred for the same reasons in entering judgment in this cause in favor of the plaintiffs, which said judgment was entered on the 25th day of January, 1896.

VI.

The Court erred in refusing to allow defendant's motion to vacate and set aside the said judgment on the showing made in support of said motion, as shown by the files, records and proceedings in said cause.

ARGUMENT AND AUTHORITIES.

We discuss these specifications in the following order:

I.

Error in overruling the demurrer to the complaint.

We think a brief analysis of this complaint will sustain this assignment.

This is an action to recover damages for failure to pay over profits.

Thorp is not compelled to pay over any profits until he receives profits for plaintiffs.

Now when are plaintiffs entitled to profits? What must be paid or done by Thorp, before dividends can be declared?

He must pay three items:

1st. Expense of operation, etc.

2nd. Duncan-Corbus mortgage.

3rd. "All and every other claim standing against or on account of the property."

Now, the complaint admits plaintiffs are to have a

percentage of such sum *only* as shall remain after these three items are discharged.

This complaint shows that after the discharge of the first item, viz., expense of operation, there remained $12,500.

They claim their 9-16 of this sum. But this is not the contract pleaded.

Before they can have their dividend there must be paid out of this balance the other two items.

The complaint shows the 2nd item, the mortgage, to amount to $3,686.59.

This deducted from the above leaves a smaller ballance of $8,813.

Before profits can be distributed there must be paid out of this balance the 3rd item, viz., "all and every claim standing against or on account of the mine."

What these amount to does not appear from the complaint.

Herein is its defect.

It must show that the amount of this 3rd item, which is the aggregate of these "other outstanding claims," and show that when this item is deducted, there is a balance to be divided as profits.

Admitting the allegations of the complaint, as the demurrer does, it fails to show any surplus in Thorp's hands.

For aught that appears from the complaint, these "other outstanding" claims equaled or exceeded this last balance, in either of which events Thorp would have no surplus or profits to divide.

Hence we think the complaint fails to state sufficient facts to show the existence of any funds out of which plaintiffs are entitled to a percentage.

"A complaint to recover damages for breach of contract where the obligation of defendant depends on a contingency other than an act to be done by plaintiff, must allege the happening of such contingency."

Wilson vs. Clark, 20 Minn., 367;
Hinds vs. Henry, 36 N. J. L., 328;
DeWein vs. Osborn, 12 Colo., 407;
Mynicks vs. Merritt, 22 Fla., 335;
vs. Caldwell, 8 Allen, 309;
Murdock vs. Caldwell, 8 Allen, 309;
Cushman vs. Haynes, 20 Pick, 132.

II.

Error in granting default without notice to plaintiff in error.

We are of the opinion that where a party has appeared generally in a cause, filed and argued a motion, and later filed and argued a demurrer, procured the release of an attachment by executing and filing a satisfactory bond, as was done in this case, such party is entitled to notice of all subsequent proceedings.

This, we think, is the general rule in nearly all, if not all, of the Code States.

The law applicable in Alaska is section 530, Volume I, Hill's Code of Oregon, (2nd Edition). It reads as follows:

"A defendant appears in action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance, and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him, unless he be imprisoned for want of bail, or unless directed by the Court, or judge thereof, in pursuance of this code."

In this application the defendants in error gave no notice of their intention to move for default, but on the

contrary concealed that fact from the attorneys for plaintiff in error, and misled them.

See affidavit, p. 30 of the Record.

Hence we claim that the order of default was irregular.

III.

Error in refusal to set aside the default upon the application and showing made by Thorp.

In Horton vs. New Pass Gold & Silver Mining Co., 27 Pac., 376, the facts show that defendant's attorney demurred to the complaint which demurrer being overruled Apr. 16, obtained time to answer. The attorney negligently forgot when the time for answer would expire.

Default was entered May 2. On May 21, motion was made to set aside default.

A heavy judgment, to-wit, $5,000, was thus obtained against defendant without a trial, upon claims for which, according to the affidavit of merits, it was not responsible. The Court say:

"While opening a default is said to be much in the discretion of the lower court, the cases show that this means a legal discretion, which has been unhesitatingly

supervised by appellate tribunals wherever it appears to have been so exercised as to result in injustice. The discretion intended is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *exgratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. * * * It is safe to say that Courts should be liberal in such matters, where a meritorious defence is shown to the whole or a substantial part of an action, and it is apparent that the failure to answer is the result of a mistake or of negligence which is not so gross as to be inexcusable, or to indicate trifling with the Court; to the end that cases may be determined upon their merits, and not upon some inadvertence, or slip or aberration, of the opposing party or counsel, such terms can always be imposed as will compensate the plaintiff for any loss occasioned by the delay, and as will make it unprofitable to a defendant to wilfully neglect to answer. Courts are established not only to arbitrate and settle the legal controversies of men, but also to settle them, so far as the inherent imperfections of human tribunals will permit, upon a just and equitable basis. This can only be arrived at after a full and patient hearing of both sides. Of course there must

be rules of procedure for doing this, which must not be trifled with. Still they are but means to an end, and whenever they have so operated, or have been so administered, that the action has been determined with reference to them instead of the great principles of right and justice, it cannot be denied that therein the tribunal has failed to reach the end for which it was created. * * * If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party who, upon hearing, might have interposed a perfectly good defense. By sustaining the default he would forever be debarred the right of a hearing. If then a *nisi prius* Court refuse to set aside a default when a party shows with reasonable certainty that he has a good defense, and he has only been guilty of carelessness and inattention to his business, but no willful or fraudulent delay, it would be highly proper even for an appellate Court to come to his relief, if the lower Court refused it."

And in the case cited, the Court, after finding that the default resulted from carelessness and negligence of defendant's attorney, and that the statute provides for the relieving of a party from a default when his negligence is excusable, further say: (p. 378) "It sufficiently appears from the affidavit that the defendant intended, in good faith, to contest its liability in the case. * * * Bearing in mind that the statute provides for

relieving a party from default taken against him through his negligence when the negligence is excusable, does it not appear at once that a judgment for over $5,000 is a rather heavy penalty to pay for such carelessness as is shown here? While it was negligence such as is properly punished by the infliction of terms, it does not seem to be of the kind that should be deemed inexcusable, and the defendant, consequently, denied any opportunity of making a defense. It was the severest penalty that could be invoked for the grossest misconduct."

Now, it is absolutely manifest from the record in the case at bar that the plaintiff in error intended to contest this claim upon its merits. He employed attorneys to represent him; they moved to make complaint more definite and certain, which motion being granted, they then demurred. Upon argument and overruling of demurrer they obtained twenty days to answer, which time expired Dec. 23rd. Mr. Crews, the member of the firm having especial charge of the case, had left Alaska, informing Mr. Bostwick, the member having no knowledge of the case, that they had sixty days to answer.

See Record, p. 93.

Mr. Bostwick knew nothing different until the morning of Dec. 23rd, the last day. He thereupon immediately sought the attorneys for plaintiff, with a view to obtaining an extension of time. Plaintiff in error be-

ing absent from Alaska, attending a Court in the State of Washington, and Bostwick having no knowledge at the time of the case, or of the defense, was unable to prepare an answer; besides this fact negotiations were then in progress with Bonnifield, the owner of seven-eights (7-8) of the claim, for settlement.

See Record, p. 87.

The Judge resided at Sitka, 200 miles away, between which place and Juneau a communication was had only semi-monthly. The next term of Court would not be held under the rule prior to March 31st following. Not finding attorneys for defendants in error on said 23rd, Bostwick saw Mr. Johnson, one of said attorneys, on the morning of the 24th, then going toward the wharf from which the steamer was about starting for Sitka, and upon asking Mr. Johnson for time, was referred by Mr. Johnson to his colleague, Mr. Heid, who refused on the ground that "Thorp was not entitled to any favor from them."

See Record, pp. 32, 33.

Neither Mr. Johnson nor Mr. Heid notified Mr. Bostwick that he (Johnson) was then en route for the steamer for Sitka to ask for default, although Bostwick asked Johnson where he was going. Had they so informed Mr. Bostwick of this fact, instead of concealing their intentions from him, said Bostwick could have

taken the same steamer for Sitka, and had he done so said default would not have been granted, as evidenced by the statement of the learned Judge, who in his written opinion states that had Bostwick shown the same diligence as Johnson, the order would not have been entered.

See Record, p. 66.

But Bostwick, knowing that attorneys for defendants in error knew full well the intention of plaintiff in error to answer and contest, and that trial could not be had until the next term of Court, and not having been served with any notice as he supposed himself entitled to, before such application, and having met and talked with Mr. Johnson while going to the boat, and later with Mr. Heid, neither of which left an intimation of their purpose, (See Record, p. 34) Bostwick certainly had reasonable grounds for believing that no such move was contemplated. If they had intimated their purpose, he could have have had yet time to proceed in the same boat to Sitka, and there would have secured a further extention, as intimated by the Judge in his opinion (p. 66 of the Record).

But the boat had gone and the order of default entered before Bostwick knew anything of plaintiff's intent. Immediately plaintiff in error, through his attorney, Bostwick, did everything possible to open up the

default, and later to vacate the judgment. The affidavit of merits discloses a perfect defense. Plaintiff in error being unexpectedly absent in Washington attending Court, and Crews, the only one of the attorneys knowing anything of his defense, being necessarily absent, Bostwick knowing nothing concerning the facts, discovers and sets forth an old verified account of Thorp as to the receipts and operation of the mine (See Ex. B., pp. 35-38 of Record).

From this account, which was the substance of the defense to be interposed, it appears that the balance remaining of the receipts after deducting the operating expenses of the mine was only $4,536.09. That this was inadequate to pay the Duncan-Corbus mortgage and "other debts and claims," which are therein set forth, and which were paid, however, by Thorp, leaving a balance of $2,216.00 due Thorp from plaintiffs.

We think the actions and conduct of attorneys for defendants in error, especially their failure to give notice, and evading Bostwick's question as to where Johnson was going, was, under all the circumstances of Thorp and Crews being unavoidably absent, and Bostwick's understanding of the extension being sixty days, and his lack of knowledge of facts, not only a surprise, but was a fraud upon him, and the showing of Thorp upon mo-

tion to vacate order of default was a showing not only of surprise, inadvertence and excusable neglect, but likewise the evidence of an absolutely perfect defense.

And upon the authority of the foregoing case of *Horton* vs. *New Pass Gold & Silver Mining Co.* we think the discretion of the Court as exercised in this case did not subserve, but did impede and defeat the ends of justice; that the negligence here was not so gross as to indicate trifling with the Court, that this cause was not determined upon its merits, but upon a slip or aberration of opposing counsel; that a ruinous judgment has been obtained against a party who upon hearing might have interposed a perfectly good defense; that a terrible penalty has been imposed upon plaintiff in error in this cause for negligence that is not entirely or altogether inexcusable. And see

Roland vs. Kryenhagen, 18 Cal., 457;
Watson vs. R. R. Co., 41 Cal., 20;
Howe vs. Coldren, 4 Nev., 171.

Default resulting from an omission, mistake, or forgetfulness on the part of the defendant, if the same was not wilful, is such inadvertence as to authorize the setting aside of the default.

Johnson vs. Eldred, 13 Wis., 483;
Whereat vs Ellis, 70 Wis., 212; (35 N. W., 314;)

Ordway vs. Suehard, 31 Ia., 481;
Jean vs. Hennessy, 37 N. W., 771;
Dougherty vs. Nevada Bank, 68 Cal., 275;
Henneman vs. LeClair, 51 N. W., 1101;
Baxter vs. Chute, 52 N. W., 379;
Lathrop vs. O'Brien, 50 N. W., 530;
Powell vs. Weith, 68 N. C., 342;
Mason vs. McNamara, 57 Ill., 274;
Brown vs. P. W. & B. R. R., 9 Fed., 183.

Defaults incurred through the ill advice or negligence of counsel are to be relieved against as well as any others.

Whereat vs. Ellis, 35 N. W., 318; (70 Wis., 212).
Hanson vs. Michelson, 19 Wis., 498.

The actions of attorneys for defendants in error on the morning following the 23rd of December, in concealing from Bostwick their intention and purpose [illegible] to Sitka, and afterwards going and defaulting him, of itself constitutes surprise.

Bast vs. Hyson, 6 Wash., 172.

In North Carolina the failure of an attorney to enter a plea, when employed to do so, was held to entitle his client to relief on the ground of surprise.

Griel vs. Vernon, 65 N. C., 76;

Meacham vs. Dudley, 6 Wend., 514;
See 1 Black on Judgments, 337.

Some of the States hold that negligence of the attorney is sufficient ground for setting aside the judgment, if the client was not in fault.

Nash vs. Whetmore, 33 Barb., 159;
Curtis vs. Ballags, 4 Edw. Ch., 639;
Phillips vs. Hawley, 6 Johns., 129;
Tripp vs. Vincent, 8 Paige, 180;
Millspaugh vs. McBride, 34 Am. Dec., 360;
Thompson vs. Goulding, 5 Allen, 82.
Bradford vs. Coet, 77 N. C., 72;
Griel vs. Vernon, 65 N. C., 76;
Hanson vs. Michelson, 19 Wis., 498;
Babcock vs. Perry, 4 Wis., 31;
Sharp vs. Mayor, etc., 31 Barb., 578;
Allen vs. Hoffman, 12 Ill., App. 573;
Ordway vs. Suchard, 31 Ia., 481;
Black on Judgments, Sec. 341.

IV. & V.

Error in granting and entering judgment on default without proof and without notice or application.

In addition to what has been urged under assignment III we think the authority of the Court to enter

judgment for plaintiffs after default is governed by Subd. 2, Sec. 249, Vol. 1, Hill's Annotated Laws of Oregon, (Second Edition) which is as follows:

"Judgment may be had upon failure to answer, as follows:

When the time for answering the complaint has expired, and it appears that the defendant, or one or more of several defendants, in the cases mentioned in section 60, has been duly served with the summons and has failed to answer the complaint, the plaintiff shall be entitled to have judgment against such defendant or defendants. * * *

2. In other actions, including all actions sounding in damages or tort, as opposed to an action for debt, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the clerk shall, upon the written motion of the plaintiff being filed, enter the default of the defendant, and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint; and in all such cases where judgment is rendered otherwise than on a verdict in favor of the plaintiff, the court without the intervention of the jury shall assess the damages which he shall

recover. The court may hear the proof itself, or make an order of reference to hear and report the testimony. The defendant shall not be precluded, by reason of his default, from offering proof in mitigation of damages. In making such assessment of damages, the court shall appoint a time therefor upon notice to the parties to the action. The party aggrieved by the assessment of damages shall have the right to appeal therefrom;"

It certainly must appear that a correct judgment for the sum due could only be arrived at by a process of calculation; that is by ascertaining the amount of the "other divers and sundry claims" against the property, which Thorp was required to pay before any dividend could be declared.

The damages were not for a fixed or liquidated sum which the clerk could enter up, but for a sum to be arrived at after deducting certain claims, the amount of which are not shown in the complaint, and can only be ascertained by evidence.

This is the very kind of a case provided for by Subd. 2 above quoted; but this is not the course followed by the learned Judge in this particular case.

The effect of a default is that the defendant is deemed to have *admitted* all that is *well pleaded* in the complaint. Where the amount of damages is not such

a fixed sum as can be entered by the Clerk without any further investigation or evidence, the default is not a final but a merely interlocutory order, and the default does not admit the amount of damages. This amount the plaintiff is required to prove, and the defendant, while not permitted to controvert any of the material and traversable averments of the complaint, is permitted to controvert the amount of damages. Thus a default in *assumpsit* where account is filed in an admission of indebtedness, but not of the amount; so an action for services rendered or the like is not upon a liquidated demand such that final judgment may be entered for the amount claimed upon failure to answer. Neither can a final judgment be rendered in an action of detinue. It is to meet just such cases that the subdivision quoted above from the Oregon Statute is intended.

Black on Judgments, Sections 28, 89, 91;
Sheldon vs. Sheldon, 37 Vt., 152;
Wolf vs. Hamburg, 8 S. C., 82;
Rogers vs. Moore, 86 N. C., 85;
Studdert vs. Hossell, 6 Humph., 137;
Williams vs. Rockwell, 64 N. C., 325;
Patrick vs. Ridgway, 4 Har. & J., 312;
Willson vs. Willson, 25 N. H., 229;
Maud vs. Loeb, 6 Sou. Rep., 376;
Russ vs. Gilbert, 19 Fla., 54;

Durden vs. Carhart, 41 Ga., 76;
Lambert vs. Sandford, 12 Atl., 519.

It is error to enter judgment on an insufficient complaint.

Black on Judgments, Sec. 84;
Amason vs. Nash, 19 Ala., 104;
Merritt vs. White, 37 Miss., 438;
Glenn vs. Shelbourne, 29 Tex., 125;
Abbe vs. Marr, 14 Cal., 210;
Barron vs. Frink, 30 Cal., 486;
Hallock vs. Jandin, 34 Cal., 167;
Bosch vs. Kassing, 20 N. W. Rep., 454;
See 64 Ia., 312;

The Court may, in its discretion and in furtherance of justice, set aside the judgment for other grounds just and reasonable, good at common law, outside the grounds mentioned in the statute.

Black on Judgments, Secs. 321-334;
Ladd vs. Stevenson, 19 N. E., 842;

The entry of the final judgment without proof was a *mistake* of the Court, and for such mistake it should be set aside.

Black on Judgments, Sec. 335.

VI.

Refusal of Court to vacate and set aside final judgment on the showing made.

What has been said under assignment III. is applicable here, with the additional statement that the order of the Court denying the motion (See Record, p. 96) recognizes the judgment is for too large a sum, and placed upon plaintiffs the burden of showing the judgment was not too large. No showing was ever made, nor was any further order of the Court had upon this subject.

With the showing made upon this motion is an answer of Thorp from which it appears that Thorp never made any written agreement as set forth in the complaint, but states the verbal agreement which was made, and from Thorp's answer it appears that the total receipts from the mines were less than the sum of the expenses, with the mortgage and other claims, and that instead of Thorp owing defendants in error, they are indebted to him nearly $3,000.00.

Therefore, we ask that the judgment of the lower Court be reversed, and the cause remanded with instructions that the same be dismissed.

Respectfully submitted,

J. T. RONALD,

Attorney for Plaintiff in Error.

No. 153.
Reply Brief of Plaintiff in Error.
Filed Feb. 17, 1900.

IN THE

Supreme Court of the United States

WILLIS THORP,
Plaintiff in Error,

vs.

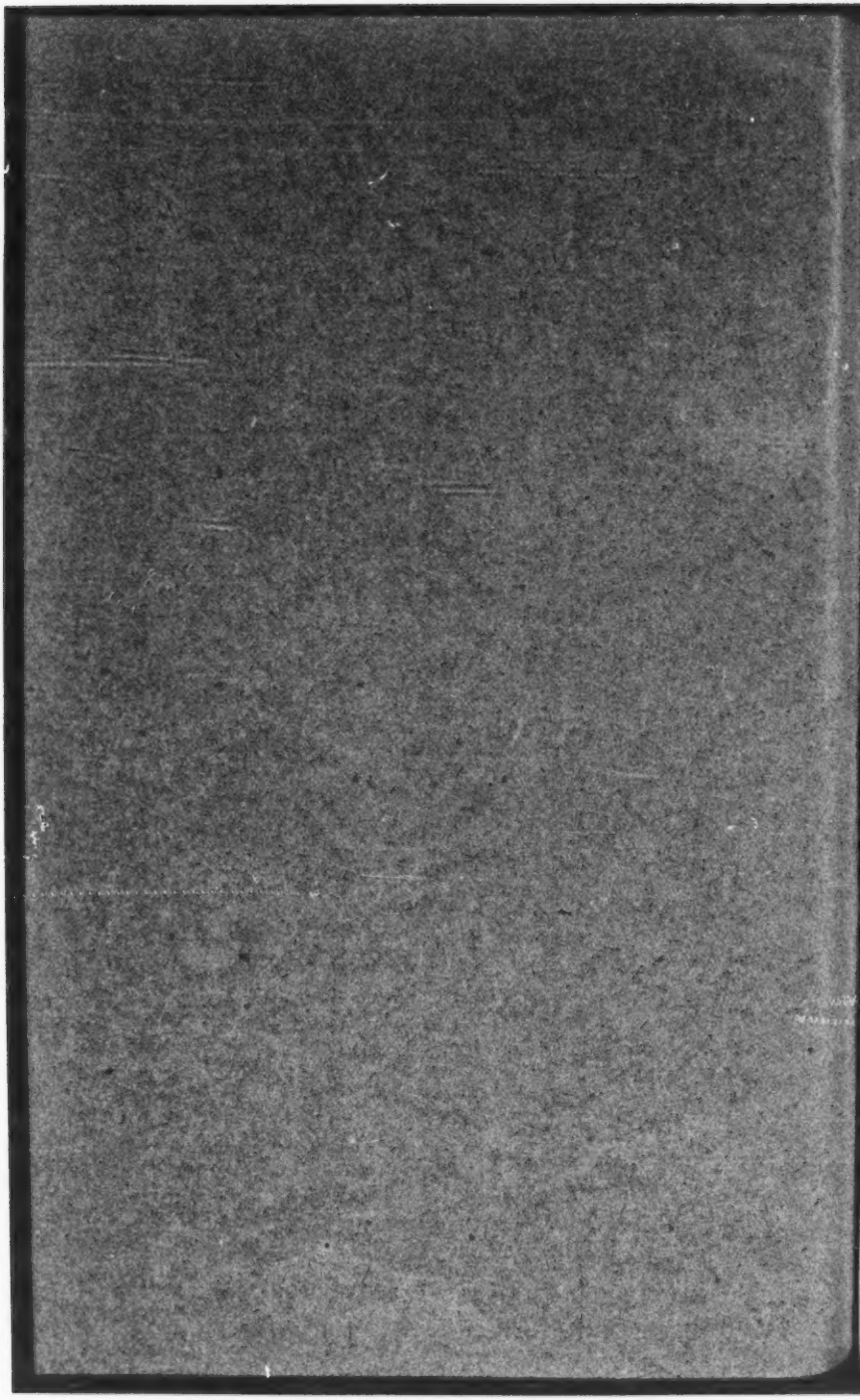
S. A. BONNIFIELD and JOHN HEID,
Defendants in Error.

No. 153.

REPLY BRIEF OF PLAINTIFF IN ERROR TO DEFENDANTS IN ERROR'S ADDITIONAL GROUND FOR DISMISSAL AND ALSO UPON MERITS.

J. T. RONALD,
Attorney for Plaintiff in Error.

Pigott & French Co. Printers, Seattle.



IN THE

Supreme Court of the United States

WILLIS THORP,
Plaintiff in Error,

vs.

S. A. BONNIFIELD and JOHN HEID,
Defendants in Error.

No. 153.

Reply Brief of Plaintiff in Error to Defendants in Error's Additional Ground for Dismissal and also upon Merits.

Learned counsel for defendants in error preface their answering brief upon the merits by a statement urging an "Additional Ground for Dismissal of Appeal."

This additional ground for dismissal urged now, but which was not specified nor urged as a ground in their motion, or their brief thereon, and which we think comes too late, is that the amount in controversy is less than the jurisdictional amount.

The judgment rendered and entered is for $7,231.25. It is true the record shows that Bonnifield, claiming to be the owner of seven-ninths of this judgment, attempted to enter a *pro rata* satisfaction. But this could not be done by the client under the circumstances of this case. He also, in the absence of his counsel, signed a stipulation extending time for Thorp to answer, but this stipulation is claimed by defendants in error to be a nullity. We think his attempted satisfaction is likewise a nullity.

Upon a writ of error brought by defendants, the amount in controversy is fixed by the sum or amount recorded in the judgment, and a remittitur or subsequent change in the amount will not serve to defeat the appeal; otherwise the successful litigant, no matter how erroneous the judgment might be, would have it in his power by entering a remittitur or partial satisfaction, to deprive the losing party absolutely of his right to appeal. In other words a remedy given a judgment debtor by law can be abolished by act of the opposing party.

Thompson vs. Butler, 95 U. S., 694;

N. Y. Elev. R. R. Co. vs. 5th Nat'l Bank, 118 U. S., 608.

Hilton vs. Dickinson, 108 U. S., 165;

The Propeller Burlington, 137 U. S., 386;

Keller vs. Ashford, 133 U. S., 610;

Dist. of Col. vs. Gannon, 130 U. S., 227;

Knapp vs. Banks, 2 How., 73;

Walker vs. U. S., 4 Wall., 163;

Gordon vs. Ogden, 3 Pet., 33.

We would further suggest that the complaint demands judgment for the entire sum, and judgment is rendered for the entire amount; that both the defendants in error are in this court contesting this case.

REPLY BRIEF ON THE MERITS.

I.

INSUFFICIENCY OF COMPLAINT.

Counsel for defendants in error admit, as contended by us, that before Thorp should become liable to defendants in error in any amount, there must be profits left after payment of three items:

(1st). Expense of operation.

(2nd). Duncan-Corbus Mortgage.

(3rd). "All and every other claim standing against or on account of the property."

They also admit that the complaint fails to allege

or credit Thorp with any outlay on account of either the second or third items above; but claims that the allegation that "Thorp extracted gold and ore of the value of $35,500 at a cost of $23,000, leaving a balance of profits of $12,500," is sufficient, and that our demurrer admits the existence of the surplus. A demurrer admits only what is properly pleaded.

They claim that these other items are matters of defense to be pleaded by us. We do not think so. Their contract binds Thorp to pay these three items and divide the balance. They must show the balance after paying said items.

We wish here to emphasize what we said anticipatory on page 12 of our former brief, viz:

There is a distinction between contingencies which must be pleaded by defendant and those which must be set forth in the complaint. If Thorp's obligation depended on an act to be done by the plaintiff, then such would be a defense to be pleaded by him; but if it depends on a contingency, as in this case, other than an act to be done by plaintiff, then the complaint must show the happening of such contingency.

(See authorities cited on page 12 of our former brief upon the merits.)

II.

Error in granting motion for default without notice to Thorp's counsel.

Defendants in error claim that Section 530 of the Oregon Code set out in our brief, does not require such notice. We cite further Section 526 of the Oregon Code, which reads as follows:

"Notices shall be in writing, and notices and other papers shall be served on the party or attorney in the manner prescribed in this title where not otherwise provided in this code."

We submit that the above sections require notices of all motions or applications to be served on the opposite party after appearance. And see

Tolmie vs. Otchin, 1 Or., 95.

III.

Error of the court in refusing to set aside the default or to relieve defendants.

The substance of the answer by the counsel to our argument on this alleged error is that unless there is an abuse of sound legal discretion the doing of the court below will not be disurbed, and they cite numerous authorities on the proposition. We do not contest this as a general proposition, but we claim that the claim of the plaintiffs below, but shows further that the facts in this case show that there was a grave abuse

of discretion by the court below. That a grave wrong was done to Thorp. The affidavit of merits which sets forth Thorp's answer shows not only a perfect defense to the claim of the plaintiff below, but shows further that they are indebted to Thorp in a large sum of money. Inasmuch as the complaint, even assuming it to be good, is very indefinite and silent on certain matters, and that they are all explained or made plain by Thorp's answer, and in view of the fact that the court was created for the purpose of doing justice between man and man, and for the purpose of righting wrong, we think that when the court below refused to allow Thorp to file his answer on terms and entered judgment against him for over $7,000, it was a grave abuse of discretion.

The cases cited by counsel, namely, *Lovejoy vs. Willamette Lock Company*, and *Askren vs. Squire*, are not applicable. In the former case judgment was entered after a trial and the receiving of evidence, and the inspection of premises by the court, and the judgment was against the plaintiff who sought to be relieved under the section in question, and the court held rightly, and the refusal of the court to grant the relief asked was, we think, under the facts and circumstances of that court not an abuse of discretion.

In the case of *Askren vs. Squire* the court held the affidavit submitted in support of the motion did not show

such excusable neglect as would warrant the Supreme Court to say that the refusal of the lower court was an abuse of discretion. There is nothing to show what the facts relied on were. In this respect it is very different from the case at bar.

See Branson vs. the O. R. Co., 10 Ore., 278.

IV. V.

Error in granting and entering judgment on default without proof and without notice. Counsel avoid this error by two propositions:

First. That the judgment is presumed to be regular.

Second. That proof was unnecessary.

We do not find fault with the proposition of counsel as to the presumption of the regularity of judgments of a court of record, and to what is presumed in cases where the record is silent, but in the case at bar the record is not silent on the question of whether proof or calculation was offered or not. On the contrary the record shows, page 36, that the court ordered judgment to be entered in accordance with its opinion denying the motion to open default, and that judgment was entered accordingly, so that on the face of the record it appears that no proof was offered, so that the decision cited by counsel on this proposition, namely: *Crane vs. Brannan, Dimick*

vs. Campbell, Jarvis vs. Blanchard are not applicable to the case at bar.

To summarize, we claim that the complaint does not state facts sufficient to constitute a cause of action, and that the District Court erred in granting a default, and in his refusal to set the same aside, and in his entering judgment without proof, for which reason plaintiff in error prays, as in his former brief, that the case be reversed.

Respectfully submitted,

J. T. RONALD,

Attorney for Plaintiff in Error.

[redacted]

vs.

[redacted]

Defendants in Error.

No. 455.

Motion of Defendants in Error to dismiss Appeal and Brief in support of Motion.

S. M. STOCKSLAGER,
GEO. C. HEARD,
Attorneys for Defendants in Suit.

Supreme Court of the United States

OCTOBER TERM, 1898.

WILLIS THORP,
Plaintiff in Error.

vs.

S. W. BONNIFIELD, AND JOHN G. HEID,
Defendants in Error.

No. 455.

Motion of Defendants in Error to Dismiss Appeal

Now come the defendants' in error and move the court to dismiss the appeal herein for want of jurisdiction, as apparent from the Record, for the reasons:

1. As appears from the Record printed at the request of defendants in error, and which is made a part of this motion, the cause was tried in the United States District Court for the District of Alaska, by stipulation of the parties, without a jury, and it is sought to bring the cause into this court by writ of error, and not by appeal, as required by Sec. 2 of the act of April 7, 1874 (18, Stat. at L. 27).

2. This case was taken to the Circuit Court of Appeals for the ninth circuit, on writ of error. On a certificate from the court the question whether the court had jurisdiction of the case was on the 18th day of October, 1897, answered by this court in the negative. (168 U. S., 174.)

By a duly certified copy filed herewith, marked Exhibit "A," and made part hereof, it appears that a mandate was duly issued out of this court directed to said Circuit Court of Appeals for the ninth circuit, on the 1st day of December, 1897, commanding that court to take further proceedings in conformity with said opinion of this court. Said mandate was duly filed in the office of the clerk of said Court of Appeals, on the 6th day of December, 1897.

Afterwards, to wit, on the 3d day of January, 1898, on motion, in said Circuit Court of Appeals for the ninth circuit, said mandate was spread upon the records of said court, and in conformity with the decision of this court and said mandate, the writ of error was dismissed for want of jurisdiction.

Afterwards, to wit, on the 4th day of January, 1898, mandate issued out of said Court of Appeals for the ninth circuit, directed to the District Court of the United States for the District of Alaska, which mandate was, on the 3d day of February, 1898, duly filed in the office of the clerk of said court.

Afterwards, to wit, on the 10th day of February, 1898, in obedience to said mandate, the order of said Circuit Court of Appeals was duly entered and said writ of error was dismissed, all of which facts appear from a duly certified copy of said proceedings filed herewith, marked Exhibit "B," and made part of this motion.

And afterwards, to wit, on the 29th day of March, 1898, an execution issued out of said United States District Court for the District of Alaska, on the judgment rendered in said cause, directed to the

United States marshal for said district.

Pursuant to the commands of said execution the said marshal duly sold to John G. Heid the following described property:

All of the interest of the said defendant, Willis Thorp, of, in, and to the lode mining claims situate, lying and being near the head of Sheep Creek, in Harris Mining District, Alaska, to wit: an undivided one-fourth (¼) part or interest of, in, and to each, the Silver Bullion Lode Claim, the Hidden Treasure Lode Claim, and the Lucerne Lode Claim.

Afterwards, to wit, on the 14th day of June, 1898, said sale so made as aforesaid, was duly confirmed by said United States District Court for the District of Alaska, which said facts appear from the duly certified copy of said proceedings filed herewith, marked Exhibit "C," and made part of this motion.

From all of which facts it will be seen that at the date of the act of July 8, 1898, under the provisions of which this case was transmitted to this court, as appears from the Record, the writ of error from the Circuit Court of Appeals for the ninth circuit had been dismissed in conformity with the mandate of this court; and in obedience to the mandate of that court, the same was dismissed by the United States District Court for the District of Alaska, execution issued upon the judgment rendered, the real estate of Thorp sold thereunder and the sale confirmed by said District Court.

S. M. Stockslager,
George C. Heard,
Attorneys for Defendants in Error.

Brief in Support of Motion.

The defendants in error have had such portions of the Record printed as appear to be necessary to present the questions involved in the foregoing motion to dismiss the writ of error for want of juristion.

They have also filed with this motion certified copies of the proceedings of the courts which have been had since the writ of error was allowed, and hence could not be a part of the Record on file in this court.

ARGUMENT.

I.

As to the ground for the motion to dismiss, it is only necessary to invite the attention of the court to the statute (act April 7, 1884, Stat. at L. 27), and the decisions of this court construing the same, to show conclusively the court has no jurisdiction to consider this case, brought here on *writ of error* instead of by *appeal*, as required by the positive provisions of the statute.

The cases of Coquihlam *vs.* United States (163 U. S. 346), and Aztec Mining Co. *vs.* Ripley (151 U. S. 79), hold that the District Court of Alaska is to be regarded as the Supreme Court of the District.

In the case of Gregory Consol. Min. Co. *vs.* Starr (141 U. S. 222), this court held:

> "A case tried by a territorial court without a jury can be taken to the Supreme Court of the United States only by appeal. That court has no jurisdiction over such a case taken to it by writ of error."

To the same effect is the cases of Story *vs.* Black (119, U. S. 235), Rogers *vs.* United States (141, U. S. 548), Hecht *vs.* Broughton (105, U. S. 235), United States *vs.* U. P. R. R. Co. (105, U. S. 263), Stringfellow *vs.* Cain (99, U. S. 610).

Under the statute thus construed by this court, the writ of error should be dismissed for want of jurisdiction.

II.

The second ground for dismissal of the writ of error raises the question of the power of Congress to authorize the issuing of a writ of error, or the confirming of one erroneously issued, after the same had been dismissed by this court, the judgment in question become final, and execution issued thereon, upon which a sale of real estate was made and the sale confirmed by the lower court.

The act of July 8, 1898, provides for the transmittal by the clerk of the Circuit Court of Appeals for the ninth circuit to this court of the records of all cases pending in said Circuit Court of Appeals on and prior to the 30th day of December, 1897, of which this court would have had jurisdiction at the date of such appeals, if proper appeals had been taken and providing they should be deemed and treated as regularly filed in this court of the date of filing in the Circuit Court of Appeals.

Although this court had held on the 18th day of October, 1897, by its negative answer to the question certified by said Circuit Court of Appeals, that appeal would not lie to that court, and on the 1st day of December, 1897, issued mandate to said Cir-

cuit Court of Appeals in effect ordering dismissal of said writ, it was not so dismissed until January 3, 1898, and it may be insisted, therefor, that the writ was still pending on the 30th day of December, 1897.

But this retroactive law was not enacted until July 8, 1898, long after the writ was dismissed, the right of appeal forfeited and lost, the judgment made final, execution issued thereon, property sold thereunder, the sale confirmed, and the judgment satisfied to the extent of the amount bid for the land sold.

Has Congress the power, by a retroactive law to restore a right thus forfeited, especially after rights had vested under the judgment of the court prior to the date of the act?

This act, as applied to the case at bar, is unconstitutional and void upon either of the grounds, viz:

1st. Its interference with the powers of the judiciary; and,

2d. It impairs vested rights which had grown up under the protection and action of the courts in their interpretation of the former law.

The authorities are numerous to the effect that the legislature cannot confer a right to an appeal or writ of error in cases where no such right existed when judgment was rendered or when such right then existing has since become forfeited.

Beaupre *vs.* Horn, 13 Minn., 366;
Burch *vs.* Nerbury (N. Y.), 374;
Durham *vs.* Lewiston, 4 Me., 140;
Lewis *vs.* Webb, 3 Me., 326;
Hill *vs.* Sunderland, 3 Vt., 507;
Bates *vs.* Kimball, 2d Chip. (Vt.), 314.

Cooley in his work on Constitutional Limitations, Sec. 94, thus states the objection to such legislation:

> "The legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form."

Black on Constitutional Prohibitions, Sec. 198, says:

> "On the same principle it is held that the legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in cases where no such right existed when judgment was pronounced, or when the right had been definitely forfeited."

In Pierce *vs.* Kitzmiller, 19 W. Va., 564, the court said:

> "If anything is self-evident in the structure of our government, it is that the legislature has no power to order a new trial or direct the court to order it, either before or after judgment. The power to order new trials is judicial, but the power of the legislature is not judicial. * * * The legislature has gone no further than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, rick, and expense of another contest."

In Davis *vs.* Menasha, 21 Wis., 421, it was held

> "An act which requires a court to grant a new trial in any case in which a final judgment has been rendered, when the period previously limited by law for moving to set aside such judgment or for taking an appeal or writ of error had expired before the passage of the act, is unconstitutional."

There is no difference in principle between granting a new trial and providing for appeal or writ of error, as, if appeal is allowed, a new trial may result.

The act is equally objectionable upon the ground that it would impair vested rights.

Cooley on Constitutional Law, at p. 332, says:

> "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

That rights in the final judgment rendered prior to the date of the act of July 8, 1898, and in the property purchased at marshal's sale on the execution issued thereon, were vested at the date of said act will hardly be questioned.

That retroactive legislation will not be permitted to impair such vested rights, upon the ground that it would be taking the property of the citizen "without due process of law," seems well settled.

In Black on Constitutional Prohibition, Sec. 195, the doctrine is thus stated:

> "It cannot be allowed, by a retroactive operation, to alter or impair vested rights, which have grown up under the protection of the courts in their interpretation of the former law. To give it such construction would cause it to violate the constitutional guarantee which secures to every man his property, except as the same may be taken by 'due process of law.'"

In the American and English Enc. of Law, 2d Ed., p. 955, the doctrine is thus stated:

> "An act of the legislature which seeks to divest or impair vested rights of property is generally held to be unconstitutional and void."

In support of the text a long line of decisions, federal and State, are cited.

See also Railway Co. *vs.* Texas, 170 U. S., 243;
Angle *vs.* Chicago St. P. M. & O. Ry. Co., 151, U. S. 1;
Noble *vs.* Union River Logging Ry. Co., 147, U. S. 165.

We insist, therefore, that our second ground for dismissal of the writ of error is also fully sustained by authority.

Respectfully submitted,

S. M. Stockslager,
George C. Heard,
Attorneys for Defendants in Error.

EXHIBIT "A."

At a stated term, to-wit: the October Term A.D., 1897, of the United States Circuit Court of Appeals for the Ninth Circuit held at the court room in the city and county of San Francisco, on Monday, the third day of January, in the year of our Lord one thousand eight hundred and ninety-eight:

Present.

The Hon. WILLIAM W. MORROW, Circuit Judge;
The Hon. JOHN J. DEHAVEN, District Judge;
The Hon. HIRAM KNOWLES, District Judge.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD, *et al.*,
Defendants in Error.
No. 289.

On motion of Richard C. Harrison, Esquire, counsel for defendant in error, Ordered mandate of Supreme Court of the United States, heretofore filed spread upon the minutes of this court.

The mandate of the Supreme Court is in the words and figures following, to-wit:

"UNITED STATES OF AMERICA, *ss:*

The President of the United States of America.

[SEAL.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Whereas, Lately in the said United States Circuit Court of Appeals before you, or some of you, in a cause between Willis Thorp, plaintiff in error,

and S. A. Bonnifield and John G. Heid, defendant in error, wherein a question arose which was certified under the seal of said United States Circuit Court of Appeals to the Supreme Court of the United States for its opinion; as by the inspection of the certificate of the judges of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States agreeably to the act of Congress in such case made and provided, fully and at large appears.

And, Whereas, In the present term of October, in the year of our Lord, one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said Supreme Court, on the said certificate and was argued by counsel:

On consideration whereof, It is the opinion of this court that the question whether the said Circuit Court of Appeals has jurisdiction of this case, must be answered in the negative.

Whereupon, It is now here ordered by this court that it be so certified to the said United States Circuit Court of Appeals.

(October 18, 1897.)

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the first day of December, in the year of our Lord, one thousand eight hundred and ninety-seven.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States."

(Endorsed:) "Mandate of Supreme Court U. S. Filed December 6, 1897, F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit."

On like motion, Lorenzo S. B. Sawyer, Esquire, appearing in opposition thereto, Ordered cause dismissed in accordance with mandate of the Supreme Court of the United States; and it is further ordered that the mandate of this court herein issue to the court below forthwith.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD AND JOHN G. REID,
Defendants in Error.

No. 289.
(Judgment.)

In Error to the District Court of the United States for the District of Alaska.

The Mandate of the Supreme Court of the United States, answering in the negative the question of the jurisdiction of this court over this case, having been upon motion of Richard C. Harrison, Esquire, counsel for the defendants in error, filed and spread upon the minutes of this court, and the court having upon like motion ordered that judgment be entered in accordance therewith,

It is now here ordered and adjudged by this court that the writ of error herein be, and the same is hereby dismissed, for want of jurisdiction.

WILLIS THORP, *Plaintiff in Error,*
vs.
S. A. BONNIFIELD, *et al.*,
Defendants in Error.

No. 289.

I, FRANK D. MONCKTON, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three pages, numbered from one to three, inclusive, to be full, true and correct copy of an order entered in the above entitled cause on January 3, 1898, as the origidal thereof remains and appears of record in my office.

ATTEST my hand and the seal of said Circuit Court of Appeals at San Francisco, California, this 8th day of March, 1899.

F. D. MONCKTON,
Clerk.

EXHIBIT "B."

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America,

[Seal.]

To the Honorable the Judges of the District Court of the United States, for the District of Alaska.—GREETING:

Whereas, lately in the District Court of the United States for the District of Alaska, before you, or some of you, in a cause between S. A. Bonnifield and John G. Heid, plaintiffs, and Willis Thorp, defendant, No. 439, a judgment was duly filed and entered in said cause in said District Court, which said judgment is of record in the office of the clerk of said District Court in the words and figures following, to wit:

In this action the defendant, Willis Thorp, having been duly and regularly served with summons and a copy of the complaint filed herein, and after demurrer of defendant to complaint herein having been overruled by the court, defendant had failed to appear and answer the complaint of plaintiffs filed herein, and the legal time for answering the said complaint having expired, and no other pleading having been filed, the default of the said defendant, Willis Thorp, in the premises having been duly entered according to law:

Now, at this day, on application of Johnson & Heid, attorneys for plaintiffs, it is hereby ordered that judgment be entered herein against the said defendant, Willis Thorp, in accordance with the prayer of said plaintiffs' complant on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that S. A. Bonnifield and John G. Heid, plaintiffs, do have and recover of and from the said defendant, Willis Thorp, the sum of seven thousand two hundred thirty-one and 25-100 dollars ($7,231.25), lawful money of the United States of America, with interest thereon at the rate of eight per cent. per annum from the date hereof until paid; together with said plaintiffs' costs and disbursements incurred in said action, amounting to the sum of $33.55.

It is further ordered, adjudged, and decreed that said plaintiffs do have execution against the property of the said defendant.

By the court.

ARTHUR K. DELANEY,
Judge.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, for the ninth circuit, by virtue of a writ of error agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, the jurisdiction of this court to entertain the writ of error herein being disputed, and the court being in doubt concerning the true interpretation of section 15 of the act of March 3, 1891, establishing the Circuit Court of Appeals, the question of the jurisdiction of this court over this case was certified to the Supreme Court of the United States for determination, which question was answered in the negative, as appears from the mandate of the Supreme Court filed herein, December 6, 1897;

And, Whereas, In the present term of October, in the year of our Lord, one thousand eight hundred and ninety-eight, the said cause came on to be heard before the said Circuit Court of Appeals, on a motion of the defendants in error to dismiss the writ of error herein, and said motion was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this court that the writ of error herein be, and the same is hereby, dismissed for want of jurisdiction.

(Jan. 3, 1898.)

You, therefore, Are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to, be had, the said writ of error, notwithstanding.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of January, in the year of our Lord, one thousand eight hundred and ninety-eight.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By MEREDITH SAWYER,
Deputy Clerk.

(Endorsed.) No. 289. United States Circuit Court of Appeals, for the Ninth Circuit. October term, 1897.

Willis Thorp, Pl'ff in Error, *vs.* S. A. Bonnifield, *et al.*

MANDATE.

Filed Feb. 3, 1898. Albert D. Elliot, Clerk.

UNITED STATES
DITRICT OF ALASKA, } *ss:*

I, Albert D. Elliot, clerk of the United States District Court for the District of Alaska, do hereby certify that the foregoing is a full, true, and correct copy of mandate in aforesaid cause, as fully as the same appears on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Juneau, in said district, this 27 day of March, A. D. 1899.

ALBERT D. ELLIOT,
Clerk.

[SEAL.]

By *Deputy Clerk.*

(Journal No. 6, page 378.)

JUNEAU, THURSDAY, *February* 10, 1898.

S. A. BONNIFIELD and JOHN G. HEID *vs.* WILLIS THORP. } No. 439.

The mandate of the Circuit Court of Appeals for the 9th Circuit having been filed herein on the 3d day of February, 1898, and being now considered, and it appearing that said Circuit Court of Appeals, on the 4th day of Jannary, 1898, ordered and adjudged that the writ of error in this case, from this court to the said Court of Appeals, be dismissed.

Now, therefore, In obedience to said mandate, the order of the said Circuit Court of Appeals is hereby entered and said writ of error dismissed.

UNITED STATES DISTRICT OF ALASKA, } *ss:*

I, Albert D. Elliot, clerk of the United States District Court for the District of Alaska, do hereby certify that the foregoing is a full, true, and correct copy of order dismissing writ of error in aforesaid cause, as fully as the same appears of record, at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Juneau, in said district, this 27 day of March, A. D. 1899.

ALBERT D. ELLIOT,
Clerk.

[SEAL.]

By *Deputy Clerk.*

EXHIBIT "C."

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF ALASKA.

S. A. BONNIFIELD and JOHN G. HEID, *Plaintiffs*, *vs.* WILLIS THORP, *Defendant*, } No. 439. Order confirming sale

An execution having issued out of this court on the 29th day of March, 1898, in the above entitled cause, directed to the United States Marshal for Alaska, commanding him, out of the property of the above-named defendant, to satisfy the judgment obtained by the above-named plaintiffs against the said defendant, Willis Thorp, that is to say: The share of said judgment belonging and due to said John G. Heid, one of the plaintiffs herein, amounting to the sum of sixteen hundred and sixteen dollars and eighteen cents, together with interest and costs; and the said United States Marshal having filed in this court a return of his proceedings, annexed and endorsed upon the said execution, as required by law, on this 2nd day of June, 1898, and the court having examined the said return, and it duly appearing to the satisfaction of this court;

That in pursuance of said execution, the said marshal caused due and sufficient notice of the time and place of holding said sale to be posted up in three of the most public places in the town of Juneau, Alaska, and to be published in the "Alaska Mining Record," a weekly newspaper, printed and published in the said town of Juneau, Alaska, for four successive weeks next before such sale, in which notice the lands and tenements to be sold were de-

scribed with common certainty ;

That at the time and place of holding such sale, specified in said notice, the said marshal caused to be sold in one parcel, at public auction at the front door of the court-house, in the said town of Juneau, Alaska, to the highest bidder, the whole of the lands and mining premises described in said marshal's return of sale and in said notice, to wit :

All of the interest of the said defendant, Willis Thorp, of, in, and to the lode mining claims situated, lying, and being near the head of Sheep Creek, in Harris Mining District, Alaska, to wit: An undivided one-fourth (¼) part or interest of, in, and to each, the Silver Bullion Lode Claim, the Bullion Lode Claim, the Ready Bullion Lode Claim, the Fraction Lode Claim, the Hidden Treasure Lode Claim, and the Lucerne Lode Claim ;

That at such sale the said John G. Heid, one of the plaintiffs hereinbefore named, and the judgment creditor of said defendant, Willis Thorp, became the purchaser of said lode claims and mining premises for the sum of two hundred dollars ($200.00), he being the highest and best bidder, and said sum being the highest and best sum bid ;

That the said sale was legally made and fairly conducted, and that the said marshal in all things proceeded, and conducted and managed such sale as by the statute in such case made and provided, and by said execution is directed and required ;

And no objections to the confirmation of said sale being made or filed : Now, on motion of H. L. Ball, attorney for the said John G. Heid, plaintiff ;

It is hereby ordered, adjudged, and decreed, that

the said sale be, and the same is hereby, confirmed and approved, and declared valid.

And the proper and legal conveyance of said lode claims and mining premises are hereby directed to be executed to said purchaser at the expiration of two months from the date hereof.

Done in open court this 14th day of June, 1898.

CHARLES S. JOHNSON,
Judge.

(Endorsed:) No. 439. In the U. S. Dist. Court, District of Alaska.

S. A. Bonnifield and John G. Heid, Plaintiffs, *vs.* Willis Thorp, Defendant.

Order confirming sale.

Filed June 14th, 1898. Albert D. Elliot, Clerk.

UNITED STATES
DISTRICT OF ALASKA, } *ss:*

I, Albert D. Elliot, clerk of the United States District Court for the District of Alaska, do hereby certify that the foregoing is a full, true, and correct copy of order confirming sale in aforesaid cause, as fully as the same appears of record and on file, at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Juneau, in said district, this 27 day of March, A. D. 1899.

ALBERT D. ELLIOT,
Clerk.

[SEAL.]

By *Deputy Clerk.*

No. 153.

Brf. of Stockslager v.

Filed Jan. 3, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD & JOHN G. HEID,
Defendants in Error.
} No. 153.

Brief of Defendants in Error in Support of Motion to Dismiss and also on the Merits.

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD & JOHN G. HEID,
Defendants in Error.
No. 153.

Brief of Defendants in Error in Support of Motion to Dismiss and also on the Merits.

The Motion to Dismiss Appeal.

A motion to dismiss the appeal for the reasons therein given, accompanied by certified copies of the proceedings subsequent to the attempted appeal to the Court of Appeals of the Ninth Circuit, and a brief in support of the motion, were filed in the office of the Clerk of this Court, with proof of service, on the 21st day of April, 1899.

Brief in answer was field by counsel for plaintiff in error in May, 1899.

The consideration of the motion was postponed by the Court until the case is reached on the merits.

Before proceeding to the argument on the merits, we invite the attention of the Court to some of the points urged by counsel for plaintiff in error, in his brief in opposition to that motion.

I.

Our motion to dismiss the appeal for want of jurisdiction of the subject matter of the action was based upon two grounds:

First. The invalidity or unconstitutionality of the Act of July 8, 1898, under which the case was brought to this Court after the expiration of the time for appeal and the issue of execution on the judgment, the sale of the property of the defendant and the confirmation by the Court of the sale, so made.

Second. Want of jurisdiction of the Court, because the case having been determined by the United States District Court for the District of Alaska, without a jury, could be brought to this Court, under the Act of April 7, 1874 (18 Stats., 27), by appeal only and not by writ of error as attempted here.

Counsel insists that defendants in error are estopped from urging as a ground for dismissing the appeal, the want of jurisdiction of the Court because the case was brought to this Court on *writ of error* instead of by *appeal*, for the reason that such was not urged in the motion to dismiss in the Court of Appeals.

The rule is, as we understand it, that jurisdiction of the subject matter cannot be waived, and may be raised at any stage of the proceedings.

II.

Counsel also urges that the Act of April 7, 1874, invoked by us, does not apply to this case because the United States District Court for the District of Alaska is not a "Territorial Court," within the meaning of said Act.

It has been held by this Court that such court is a Territorial Court and does fall within the provisions of said Act. Coquitlam *vs.* The United States (163 U. S., 346), and Aurora Mining Company *vs.* Ripley (151 U. S., 79).

III.

Counsel also urges that the motion to dismiss should be denied because the grounds stated are all waived by the general appearance entered by us for defendants in error in this Court.

But, as before stated, while jurisdiction of the person might be thus waived, jurisdiction of the subject matter cannot be waived. No action of the parties can give the court jurisdiction when it has none. (Freeman on Judgments, Section 120.)

All of the grounds for dismissal urged in the motion go to the jurisdiction of the court, the case being brought to this Court on writ of error, under the provisions of the Act of July 8, 1898.

Additional Ground for Dismissal of Appeal.

An examination of the complaint shows that nine-sixteenths of the net profits arising from the operation, by plaintiff in error, of the Aurora Mine, upon lease from defendants in error, claimed by said defendants in error as due them, belonged to them in the proportion of seven-sixteenths to Bonnifield and two-sixteenths to Heid. (Rec., p. 1.)

Judgment was rendered, as claimed, on default of plaintiff in error, January 25, 1896, for $7,231.25. (Rec., p. 36.)

On the 28th day of January, 1896, Bonnifield entered full satisfaction of so much of said judgment as belonged to him, claiming that it was seven-eighths thereof. (Rec., p. 50.)

This left but one-eighth, or $903.95 of said judgment unpaid and unsatisfied, on the said 28th day of January, 1896.

The writ of error was asked for and granted on the 10th day of February, 1896, or thirteen days after this satisfaction was entered. (Rec., pp. 54 and 59.)

It follows that the whole amount involved at tho date of the granting of the writ was but $903.95, which is less than the amount required by law to authorize the bringing of the case to this Court on writ of error or appeal, and the writ should be dismissed for this reason.

Statement of Case on the Merits.

The defendants in error held a lease of the Aurora Lode mining claim, in Alaska, with the right to work and mine the same until April 24, 1896. This lease was transferred or assigned to plaintiff in error on June 26, 1894, with all the privileges and rights of defendants in error therein, for a term ending December 31, 1894, subject to the payment by said plaintiff in error of a certain mortgage for $3,686.59, and all claims then outstanding against said premises contracted by Bonnifield and Runkle, former lessees, and agreed to pay to said defendants in error nine-sixteenths of the net profits or proceeds derived by said plaintiff in error in working and mining said claim and milling the ore extracted or mined therefrom, during said term in the proportion of seven-sixteenths to Bonnifield and two-sixteenths to Heid.

Under said lease he extracted and took from said mine gold of the value of $32,000 and concentrates of the value of $3,500 which he sold and disposed of.

The cost and expense of mining, operating and extracting said gold and ore was $23,000, which sum includes $200 advanced by Bonnifield and not repaid by said plaintiff in error, *leaving a balance of profit or net proceeds of $12,500.* Nine-sixteenths of which said sum, to-wit: $7,231.25 due and owing defendants in error.

On the 15th day of April, 1895, the defendants in error

filed complaint alleging the foregoing facts and asking for judgment for said sum of $7,231.25.

Summons was issued and duly served on the plaintiff in error, who, on the 4th day May, 1895, appeared by Bostwick & Crews, his attorneys, and filed motion for order requiring defendants in error to make their complaint more specific, which motion was sustained and the complaint amended in accordance with said order. Whereupon, plaintiff in error filed demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

On the 3d day of December, 1895, the Court overruled said demurrer, to which ruling of the Court plaintiff in error excepted, and he was given until Monday, December 23, 1895, to file his answer to said complaint. Afterwards, on the 26th day of December, 1895, the time for filing said answer having expired and no answer having been filed, on motion of attorneys for defendants in error, in open court, default of said plaintiff in error was entered.

And afterwards, to-wit: on the 10th day of January, 1896, after service of notice, said plaintiff in error filed a motion for an order vacating, setting aside, and holding for naught the order of default theretofore granted, together with all subsequent proceedings, and allowing him further time in which to prepare, serve and file his answer, for the reasons in said motion alleged; which motion was by stipulation, submitted to the Court upon the affidavits and all of the papers, files, records and proceedings had and done in the cause, without argument.

On the 25th day of January, 1896, the Court overruled said motion (Rec., p. 29), and on the same day judgment was rendered by default, in favor of defendants in error, for the sum demanded in their complaint, viz., $7,231.25 (Rec., p. 36).

On the 10th day of February, 1896, plaintiff in error filed notice of motion for order vacating and setting aside said judgment and the execution issued thereon January 25, 1896 (Rec., p. 37). This motion was, on the 10th day of February, 1896, overruled by the Court, with the statement that defendants in error would be given until February 25, 1896, to file affidavit to show no error existed in the computation of the amount of the judgment (Rec. p. 50).

And on the said 25th day of February, 1896, in accordance with the requirement of the Court, defendants in error filed the affidavits of said John G. Heid and of their attorneys, C. S. Johnson and John F. Maloney, all showing the correctness of said computation (Rec., p. 59).

Whereupon on the said 25th day of February, 1896, plaintiff in error filed motion to strike said affidavits from the files, which motion was overruled by the Court and exception taken and allowed by the Court (Rec., p. 68).

On the 10th day of February, 1896, writ of error to the said District Court of Alaska, transferring said cause to the Circuit Court of Appeals, was granted, and citation issued and served upon said defendants in error (Rec., pp. 57 and 58).

Bill of exceptions was signed by the Hon. Arthur K. Delaney, judge of said court, and filed February 25, 1896.

Upon certificate of the Circuit Court of Appeals of the Ninth Circuit this court held appeal would not lie to said Circuit Court of Appeals (168 U. S., 174).

Afterwards, to wit: On the sixth day of September, 1898, on motion, the record in said cause was transmitted to this Court by the clerk of said Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of the Act approved July 8, 1898, providing for the transfer of certain causes from that court to this Court, where it was filed October 25, 1898.

ARGUMENT.

I.

The Sufficiency of the Complaint.

Counsel insists the complaint is insufficient because it fails to show the amount of "other outstanding claims," which, under the agreement, plaintiff in error was to pay, and that after deducting such amounts, there was net profits to the amount claimed. In other words, that the complaint fails to show any surplus in the hands of plaintiff in error.

We do not think this contention is sound. The demurrer admits the facts stated in the complaint, which are that plaintiff in error took out gold and concentrates which he sold for $35,500, and that the whole expense of mining and milling said gold and ore was $23,000, leaving a balance of net profits or proceeds of $12,500. This is certainly a sufficient statement of the fact that a surplus existed and the precise amount of it. It could not have been better or more definitely pleaded. If other payments had been made, this was clearly a matter of defense. The defendants in error were not required to plead alleged facts, which, if they existed, were matters to be set up in defense. They were not required by any rules of pleading to give plaintiff in error credit for any payments which he claims to have made. We think, therefore, the complaint was sufficient to constitute a cause of action and the objections thereto are not well taken.

II.

The second error alleged is, in granting default without notice to plaintiff in error.

Under the act of Congress of May 17, 1884, the Code of Oregon is made applicable to the case. But we do not think the sections of Hill's Oregon Code, set out by counsel in his

brief, require any such notice. And, we are not aware of any rule of code pleading which requires notice of a motion made in open court to take default against parties who fail to file their pleadings within the time limited by the court therefor. In fact, the court might, of its own motion enter such default. Certainly plaintiff in error, was not entitled to notice of his own failure to comply with an order or rule of the court, made upon him in open court. The mere fact of his failure to comply with the order and file his answer within the time allowed therefor of itself worked a default, and it was only necessary to enter the same of record. Hill's Oregon Code, Note, p. 333 ; Barron *vs.* Deleval, 58 Cal., 95.

III.

Error in refusing to set aside the default upon the application and showing made by Thorp.

We beg to invite the attention of the Court to the very able and exhaustive opinion of the trial judge, in overruling the motion of plaintiff in error to set aside said default, and to the decisions cited by the court in support of his ruling.

Counsel in this Court has abandoned the principal contention of counsel below, viz, that the consent of one of the defendants in error for the filing of the answer after the expiration of the time given by the court, obtained after one of the parties, and the attorneys for both, had refused to grant further time, gave him the right to file it after the expiration of the time fixed by the Court. He rests his case upon the ground that the failure by the attorneys to file answer under the circumstances shown by the record, was such mistake, inadvertence, surprise or excusable neglect, as under the Oregon Code, should have been relieved against, upon the said motion. The section of the Code upon which

counsel relies is Section 102, Hill's Code of Oregon, pp. 242 and 243.

This section provides that the Court may, in its discretion, "relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The only question here is, did the Court so abuse his discretion in refusing to set aside the default under the showing made in this case, as to justify this Court in reversing and setting aside all subsequent proceedings in the case? We think not.

As stated by the Court, the only evidence submitted in support of the motion was the affidavit of H. Bostwick, one of the attorneys for Thorp, who swore, that until he examined his docket on the morning of December 23, 1895, he was under the impression that he had sixty days in which to answer, but that he learned the time was out on that day, that he called at the office of Johnson & Heid about 10 o'clock that day, but did not find either of them in, that *he was engaged in his office the remainder of that day and did not have a chance to see said attorneys until the next morning*, when he saw Johnson going to the Juneau wharf with a grip; that he spoke to him and mentioned the fact that the time for answer had expired and wanted Johnson to extend it, and that Johnson referred him to Heid, who was one of the defendants in error; that he prepared a stipulation and went to the office of Johnson & Heid, where Mr. Heid refused to extend the time; that he stated to Heid unless they gave him time to answer, it would compel him to go to Sitka and get an order of court; that thereafter, about 2.30 P. M., he saw Bonnifield, one of the defendants in error, who signed with attorneys for plaintiff in error, a stipulation extending the time to answer to March 1, 1896; that it was then too late to reach the mail steamer; that the default was taken through mistake, inad-

vertence and neglect, as set forth; that he *relied upon the stipulation, and therefore did not go to Sitka to get the extension*, and also upon the fact that the attorneys for Heid knew full well that he intended to answer and would not take a default. He also swore *Thorp had fully stated the facts to him*, and from such facts he believed he had a good and substantial defense on the merits.

Upon this evidence the Court found there was no such mistake, inadvertence, surprise or excusable neglect as to authorize the setting aside of the default taken and entered; holding that there was ample time between 10.30 A. M. and 2.30 P. M. December 23d, when Bostwick swore he met Johnson apparently going to the wharf to take the mail steamer to Sitka, for counsel for plaintiff in error to have also taken the steamer, it appearing that, even at 2.30 P. M., the boat was still at Douglass Island (reached from Juneau by ferry boat), although the ferry boat had at that time left Juneau.

There certainly was no abuse of the discretion of the Court in refusing to set aside, upon this showing, the default taken and entered. That the ruling is correct, it seems to us, is perfectly clear. White *vs.* White, 169 Mass. (47 N. E., 499).

"Unless there is an abuse of the sound legal discretion with which the court is clothed, courts will not interfere."

Black on Judgments, 354; Freeman on Judgments, 441; Howe *vs.* Collins, 4 Nev., 172; Harper *vs.* Mallory, 4 Nev., 449; State *vs.* Mining Co., 3 Nev., 194; Ewing *vs.* Jennings, 15 Nev., 381; Gaines *vs.* Erlanger, 86 Cal., 60; Underwood *vs.* Underwood, 87 Cal., 523; Wylie *vs.* Sierra Gold Co., 120 Cal., 485; Rouley *vs.* Murray, 69 Ill. App., 428; Stafford *vs.* McMillan, 25 Wis., 566; Bertline *vs.* Bauer, 25 Wis., 486.

There was no mistake; but there certainly was neglect and it was not caused by surprise, or inadvertence; there was therefore no *excusable neglect*. Bostwick's affidavit shows clearly that after his attention was called to the fact that he had but twenty days within which to file his answer, there was, by his own showing, ample time to have taken the boat and gone to Sitka, and in the language of the court, "have prevented the entry of the order." He also states that his client had put him in possession of the facts upon which his defense was based. How, then, can it be said that there was any excuse for his negligence? There was none. It was totally *inexcusable* and *indefensible*. If, instead of seeking to circumvent the attorneys of the defendants in error, who refused to extend the time to answer, when seen at about 10 o'clock in the morning of the day the boat left Juneau for Sitka, by hunting up one of the defendants in error and secretly getting him to sign a stipulation to extend the time, and thus quietly resting and relying upon the advantage of the attorneys so obtained, he had been diligent in the discharge of his duty and taken the boat which Johnson took he could have avoided all the trouble and protected his client's claimed rights. But no, he relied, as he says, upon this stipulation and the good nature of the attorneys whom he was seeking to take advantage of, they having refused to extend the time. The sequel shows he was relying upon a stipulation without force, and that he had no right to rely upon the indulgence of attorneys for defendants in error who had no just right, looking to the interest of their clients, to waive a legal advantage gained by the carelessness and inexcusable neglect of counsel for plaintiff in error. It is not the province of the courts to reward the slothful, at the expense of those who are diligent, but quite the contrary.

As to the suggestion that Johnson concealed from Bostwick, on the morning of December 23d, the fact that he was

on his way to Sitka, an examination of Bostwick's affidavit does not bear any such construction. He says when he accosted Johnson, who had a grip in his hand, as to where he was going, he told him to the wharf. For what purpose would he be going to the wharf, except to take the boat, which all knew was bound for Sitka?

But, counsel insists that under the ruling of the Supreme Court of Nevada in Horton *vs.* New Pass Gold and Silver Mining Company (27 Pac., 376), from which he quotes at length, his client should not be made to suffer for the neglect of the attorney, who failed to file his answer within the time allowed by the Court therefor.

This contention assumes that the carelessness and negligence of the attorney, is not the carelessness and negligence of the client. That even though the attorney may violate or neglect to comply with the order of the Court, and thus put his client in default, the default must be set aside, if the client can show that he was not guilty of negligence. Such a rule would require the Court to deal with both the attorney and his client in the proceedings in Court, and although one might be in default, if the other was not to blame therefor, relief must be granted. This certainly cannot be the correct rule, but neglect of the attorney must be held to be neglect of the party. Spaulding *vs.* Thompson, 74 Am. Dec., 221 (12 Ind., 477).

In Smith *vs.* Tunstead, 56 Cal., 177, the Supreme Court of that State said:

"The party was not negligent, but the attorneys were, and parties in this State are held not entitled to relief on account of negligence of their attorneys."

In Freeman on Judgments, Section 112, the learned author says:

"The neglect of an attorney is uniformly treated as the neglect of the client, except in New York."

The client is bound by the acts of his attorney, or his failure to act, and must look to the attorney for relief, the rule being that the attorney is liable to his client for any failure to prepare pleadings and take necessary steps to protect his interests, if by such delay or failure his client's rights are prejudiced. Am. & Eng. Enc. of Law, 2d Ed., Vol. 2, p. 382.

He has had his day in court and he will not be heard to complain.

Daring *vs.* Quimay, 26 Oregon, 558.

We invite attention, in this connection, to the list of authorities cited by Justice Murphy, in his dissenting opinion in the case of Horton *vs.* New Pass Gold and Silver Mining Co., *supra*, which case is relied upon by counsel for plaintiff in error.

The motion might have been properly overruled by the court because of the failure of plaintiff in error to submit with the motion copy of the verified answer which he proposed to file, so that the court might judge whether he had a meritorious defense. Bailey *vs.* Williams, 6 Oregon, p 63; Superior Con. Land Co. *vs.* Dunphy, 83 Wis., 188 (67 N. E., 428); Norton *vs.* Hixon, 25 Ill., 439; Mayer *vs.* Mayer, 27 Oregon, 133.

There having been no abuse of discretion shown, the motion to set aside the default was properly overruled.

IV.

The fourth and fifth assignments of error may be considered together, and are stated by counsel as follows:

"Error in grantiug and entering judgment on default without proof and without notice or application."

Section 263 of Hill's Oregon Code provides that:

"When judgment is given for want of an answer, the entry shall state substantially that the defendant has been duly served with the summons and has failed to answer the complaint."

All these requirements were fully complied with in this judgment. We have been unable to find any statutory provision, or rule of practice, requiring notice to be given or application made, for judgment by default. After the defendant is defaulted it would hardly seem to be necessary to give him notice of the entry of judgment based upon his default, and certainly he is not in a position to demand it.

As to the objection that no application was made, while not conceding any was necessary, the record shows the judgment was granted and entered "on application of Johnson & Heid, attorneys for plaintiff." (Rec., p. 37.)

As to the alleged error in rendering judgment without proof, an inspection of the record will show it fails to bear out this charge.

It is conceded the record is silent as to what kind or quality of evidence, whether oral or record, or both, was introduced. But we do not think the Court was required to set out such fact in the judgment. Certainly the Oregon Code, by which the case is governed, does not make any such requirement.

Section 260 of Hill's Oregon Code provides:

"All judgments shall be entered by the clerk in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action."

But there is nothing which would require the judgments to show upon what evidence the "determination of the action" was arrived at by the court.

Freeman on Judgments, Sec. 2, states the requirement as follows:

"A judgment should be a simple sentence of the law upon the ultimate facts admitted by the pleadings or found by the Court (citing) Gregory *vs.* Nelson, 41 Cal., 248."

Where judgment was entered upon a default for $124.75 and it did not appear that any testimony had been heard, the presumption that a judicial officer has acted regularly was held to apply to the case, and nothing appearing to the contrary, this Court will presume that the judge had informed himself as to the matter of complaint in a proper and regular manner, and such judgment will be affirmed.

Crane *vs.* Brannan, 3 Cal., 192.
Dimick *vs.* Campbell, 31 Cal., 238.
Jarvis *vs.* Blanchard, 6 Mass., 4.

The rule is also that every intendment in favor of a judgment rendered by a Court having jurisdiction will be indulged.

Groslouis *vs.* Northcut, 3rd Oregon, 394.

"A judgment of a Court will always be presumed to be regular."

Wilson *vs.* Wilson, 18 Ala., 176; Venable *vs.* McDonald, 4 Dana (Ky.), 336; Green *vs.* Creighton, 15 Miss. (7 Smed. and M.), 197; Pardan *vs.* Felts, 10 Miss. (2 Smed. and M.), 535; Briggs *vs.* Clark, 8 Miss. (7 How.), 457; Coleman *vs.* McKnight, 4 Mo., 83.

But, was proof necessary in this case? This action was based upon a written assignment by defendants in error to plaintiff in error of their lease of the Aurora Lode mine, for a portion of their term, upon terms and conditions in said

assignment fully set out. It was alleged the plaintiff in error went into possession and operated said mine under said assignment, taking out a large quantity of gold and ore, and refused to pay over to defendants in error the portion of the net profits to which they were entitled under said assignment of their said lease. These facts were admitted by the default.

It is thus seen it is not a case "sounding in damages or tort," but rather, an action "arising upon contract for the recovery of money."

Now, by subdivision 1, of Sec. 249, Vol. 1, Hill's Annotated Laws of Oregon, it is especially provided that the clerk may, upon the application of the plaintiff, enter default and follow it immediately by judgment, *without proof*, "in an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof."

Again, the summons issued and served in the case at bar notified the plaintiff in error that if he did not appear and answer, the defendants in error would take judgment against him in the sum of $7,231.25. (Rec., p. 8.)

The case of Hartman *vs.* Williams, 4th Oregon, 254, settled the practice in this class of cases. That was an action for the violation of a verbal contract, to employ plaintiff and wife and find them house room and board for one year. The breach complained of, was their discharge by defendant prior to the expiration of the year, by which they suffered damages, by having been thrown out of employment, deprived of board and shelter and injured in various and divers ways, to the amount of $3,711.75. The summons notified defendant below if he failed to appear and answer, plaintiff would take judgment for $3,711,75. The defend-

ant having defaulted judgment was rendered for that sum, and on appeal the court say :

"The only question necessary to consider is whether a judgment, final by default, can be rendered properly upon an unliquidated demand. The practice is a new one, and appeared at first unfavorably. Upon an examination however, of Sec. 150 of the Practice Act, there remains no doubt as to its correctness, and when it is generally understood, we see no danger to be apprehended from it. The defendant being notified in the summons, of the amount for which the plaintiff will take judgment, is saved the necessity and expense, if he has no defense, of appearing to the action, to protect himself against an improper recovery; while on the other hand, the plaintiff avoids the delay and trouble of resorting to the writ of inquiry, for the purpose of having his damages assessed."

See also the case of Daniel *vs.* Campbell, 31st Cal., p. 239.

While we are aware this is not strictly speaking a default case, that is one where the defendant failed to appear in answer to the summons, but one where, after appearing and demurring to the complaint, which demurrer was overruled, he failed to discharge the rule or order made against him to file his answer within the time allowed therefor by the court. As we understand it, the rules and principles governing the one are applied to the other. In fact, there seems to be a greater reason for thus allowing the entry of judgment without writ of inquiry, in a case like the one at bar where the defendant was not only notified in the summons of the amount for which the plaintiffs would take judgment, but he appeared, examined and tested the complaint which notified him of the same fact, and in addition informed him of all of the grounds upon which the claim for judgment was based. He thus had actual knowledge of the amount for which judgment was claimed and of plaintiff's whole case.

In this connection we beg to call the attention of the

Court to the case of Clemente *vs.* Berry, 11th How., p. 397, decided by this Court, Mr. Justice McLean delivering the opinion of the Court.

VI.

The sixth and last objection urged by counsel is based upon the refusal of the Court to vacate and set aside final judgment on the showing made.

The motion to vacate the judgment was supported by the affidavit of H. Bostwick and W. E. Crews, attorneys, and by S. A. Bonnifield, accompanied by a verified answer.

The facts as to negligence are stated in the affidavits of the attorneys substantially as in the affidavit of Bostwick in support of the motion to set aside the default.

There is an attempt, by the answer of Thorp and the affidavits of the attorneys, to show that there should have been a judgment for plaintiff in error for $2,934 instead of for $7,231.25 for defendants in error. But they contradict their paper theory of the case by filing the affidavit of Bonnifield, to the effect that after rendition of judgment he had settled with Thorp, who paid him for his one-eighth interest the sum of $800.

This apparently raised some doubt in the mind of the Court as to whether the computation upon which the judgment was based was correct, and he gave defendants in error time to file affidavits showing it was correct. Within the time allowed therefor, defendants in error filed the affidavits of John G. Heid, Judge C. S. Johnson, and John F. Maloney, in contradiction of the affidavits of Bostwick and Crews, as to many of the facts stated by them, and also sustaining the correctness of the computation upon which the judgment was based, Heid and Maloney swearing that they had carefully gone over all the papers, including all the vouchers furnished them by Thorp, and that the amount

was correct. They also fully explained the conduct of Bonnifield in connection with the whole case and the reasons given by him to Johnson for his action. Motion was made by plaintiff in error to strike these affidavits from the files, which was overruled by the Court. And the Court being satisfied with the amount of the judgment, no further order or proceedings were had. Counsel is mistaken, therefore, in his statement that no showing was made as to the correctness of the amount for which judgment was rendered. He evidently overlooked this part of the record of the proceedings (Rec., p. 59).

All that was said under assignment 3 may be considered also in connection with this assignment.

In the case of Foster *vs.* Jones, 1st McCord (S. C.), 116, it was said :

"It is difficult to foresee all the consequences which might result from permitting a party, after judgment and execution, to set aside the proceedings against him on the ground of negligence or ignorance of the attorney. It would very much tend to destroy all rules of pleading, and produce endless litigation."

In the later cases decided by the Supreme Court of Oregon, involving the question of the discretion of the Court in setting aside, or refusing to set aside, judgments rendered by default, under Sec. 102 of Hill's Code, it is said:

"Action of the trial court in refusing to set aside a default judgment on the ground of excusable neglect under Sec. 102 of Hill's Code, is discretionary, and will not be disturbed only for manifest abuse. (Lovejoy *vs.* Willamette Lock Company, 24th Oregon, p. 569 ; Askren *vs.* Squire, 29th Oregon, p. 228.)"

We insist the record shows there was no abuse of the discretion with which the Court was clothed, either in overruling the motion to set aside the default of the plaintiff in

error entered because of his failure to file answer within the time allowed therefor by the Court; or in overruling his motion to set aside the judgment by default rendered against him and the execution issued thereon, upon the showing made by him in support of his motion.

There being no error in the record we ask that the judgment of the United States District Court for the District of Alaska be in all things affirmed.

Respectfully submitted,

S. M. STOCKSLAGER,

GEORGE C. HEARD,

Attorneys for Defendants in Error.

WASHINGTON, D. C., *December 11, 1899.*

THORP v. BONNIFIELD.

177 15
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180 636

TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 153. Argued March 1, 1900. — Decided March 19, 1900.

When a defendant has, by his own action, reduced the judgment against him by a voluntary settlement and payment below the amount which is necessary in order to give this court jurisdiction to review it, the real matter in dispute is only the balance still remaining due on the judgment, and the right of review in this court is taken away.

The court, being satisfied that the amount in dispute in this case is less than the amount required by statute to give it jurisdiction, orders the writ dismissed for want of jurisdiction.

THE statement of the case will be found in the opinion of the court.

Mr. J. T. Ronald for plaintiff in error.

Mr. S. M. Stockslager for defendants in error. *Mr. George C. Heard* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This case has been transferred from the United States Circuit Court of Appeals for the Ninth Circuit, under and by virtue of an act of Congress, (30 St. 728,) providing for such transfer. The act is set forth in the margin.[1]

[1] That all cases, civil and criminal, filed on appeal from the District Court of the United States for the District of Alaska, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and pending on appeal therein, on and prior to the thirtieth day of December, 1897, of which the Supreme Court of the United States would have had jurisdiction under the then existing law, if a proper appeal had been taken thereto at the time said cases were filed on appeal in said Circuit Court of Appeals, be, and the same are, deemed and treated as regularly filed on appeal in the Supreme Court of the United States as of the date when filed in said Cir-

By the terms of this act it is to operate only upon those cases of which this court would have had jurisdiction under the law existing at the time the case was taken to the Circuit Court of Appeals, if a proper appeal had been taken to this court at the time the case was filed in the Circuit Court of Appeals. If this act be valid therefore, we must inquire whether the case was one over which this court would have had jurisdiction if a proper appeal had been taken.

The case was commenced in the United States District Court for the District of Alaska in April, 1895, for the purpose of recovering moneys alleged to be due under the terms of a contract for the leasing of certain mining properties, situated in that district. The plaintiffs (defendants in error) demanded judgment for $7231.25, besides costs of the action. The defendant (plaintiff in error) demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and leave given to answer, which the defendant failed to do within the time granted, and judgment was entered by default for the amount claimed in the complaint, with costs.

The defendant then moved to vacate and set aside the judgment, and that motion was denied, and he sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit. The defendants in error moved to dismiss the writ on the ground that the Circuit Court of Appeals had no jurisdiction.

The Circuit Court of Appeals certified the question to this court for the purpose of receiving its instruction upon the question of jurisdiction. This court answered the question in the negative, denying the jurisdiction of the Circuit Court of Ap-

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cuit Court of Appeals. The clerk of said Circuit Court of Appeals is directed to transmit to the Supreme Court of the United States, as soon as practicable, the records of such cases, and the clerk of said Supreme Court is directed to receive and file the same for hearing and determination in the Supreme Court of the United States when regularly reached on the docket, subject to any rules made or to be made by said court which may be applicable.

Approved July 8, 1898.

peals. 168 U. S. 703. The mandate from this court was duly issued, and the Circuit Court of Appeals in conformity therewith dismissed the writ of error, and on January 4, 1898, it issued its mandate to that effect, directed to the District Court of the United States for the District of Alaska, which was filed in the office of the clerk of that court on February 3, 1898, and in obedience to that mandate the writ of error was duly dismissed by the District Court.

On March 29, 1898, an execution upon the original judgment was issued from the District Court, directed to the United States marshal of the district, under which certain property of the defendant was sold and a return made by the marshal to the court, and on June 14, 1898, the sale was duly confirmed by the District Court.

It thus appears that nearly a month before the passage of the act of July 8, 1898, (*supra,*) the judgment of the District Court of Alaska had been carried into effect, an execution issued, the property sold, a report made of the sale to the court, and that sale confirmed.

The defendants in error made a motion in this court to dismiss the writ for want of jurisdiction. That motion was postponed by the court until the hearing of the case upon its merits, and upon the argument thereof the motion to dismiss was renewed upon the ground (among others) that the act of Congress, if applicable to cases such as this, was unconstitutional and void.

A further ground for dismissal was set up because, as alleged, it appeared from the record that the amount in dispute between the parties was less than the sum necessary to give jurisdiction to this court. This ground necessitates the statement of a few additional facts, and if it be well founded, it relieves us from a discussion of the constitutional question.

After the demurrer of the defendant to the plaintiffs' complaint had been overruled and leave given to answer, and the defendant made default, judgment was entered for the amount of the plaintiffs' claim. This was on January 25, 1896. By the complaint it appears that under the lease of the mine by the plaintiffs to the defendant Thorp, the latter agreed to mine, work and operate the premises, and after making certain payments,

etc., he was to retain for himself seven-sixteenths of the profits or net proceeds arising from the operation of the mine, and was to pay to the plaintiffs the remaining nine-sixteenths in the proportion of seven-sixteenths to the plaintiff Bonnifield and two-sixteenths to the plaintiff Heid.

Immediately after the entry of the judgment it appears by the affidavits in the case, presented for the purpose of setting the judgment aside, that the defendant and the plaintiff Bonnifield entered into negotiations in regard to the judgment, and Bonnifield became satisfied that it had been entered for more than was equitably due from the defendant, and accordingly upon the payment of a certain sum to him (much less than by the face of the judgment appeared to be due him) Bonnifield "made a complete settlement of all his matters and differences with the defendant, and received a full and complete settlement and satisfaction for his interest in the judgment obtained in the case," and Bonnifield thereupon "executed a satisfaction of all his right, title and claim in and to said judgment, to wit, seven-eights thereof." This satisfaction was given the defendant on the 28th of January, who filed the same in the clerk's office on the 10th day of February, 1896. After he had filed the satisfaction, and on the same day, the defendant filed his petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

The judgment in the case continued to stand on the face of the record at its original sum, $7231.25 recovery, and $33.55 costs. By the defendant's voluntary settlement with and payment to Bonnifield, one of the plaintiffs, the balance remaining unpaid was less than the amount necessary to give this court jurisdiction.

The plaintiff in error cites various cases to maintain the proposition that when the defendant in the case below brings it here for review the amount of the judgment or decree against him governs our jurisdiction, and, as in this case, the judgment is for more than seven thousand dollars, he maintains that this court has jurisdiction notwithstanding the payment and settlement above mentioned.

But those cases have no application when the defendant by his

own action has reduced the judgment by a voluntary settlement and payment below the amount which is necessary in order to give this court jurisdiction to review it. The real matter in dispute is in such case the balance still remaining due on the judgment. Otherwise he might voluntarily settle the controversy and pay the whole judgment, and then seek to review it. In this case it appears there was a "full, final and complete settlement of all matters and differences" between the defendant and plaintiff Bonnifield, and the latter then executed "a full and complete satisfaction of all his rights, title and claim in and to said judgment." And this was procured by the defendant's own voluntary act. Clearly there was no matter in dispute relative to that judgment after such voluntary settlement and payment beyond the sum remaining due thereon. Thus an event has intervened subsequently to the entry of the judgment, and one which owes its existence to the act of the defendant himself, which has taken away his right of review in this court. It is a compromise or settlement, *pro tanto*, between the parties; or it is like a case where, pending a suit concerning the validity of the assessment of a tax, the tax is paid; or the amount of the tax has been tendered and deposited in a bank which by statute had the same effect as actual payment and receipt of the money. *Dakota County* v. *Glidden*, 113 U. S. 222; *Little* v. *Bowers*, 134 U. S. 547; *California* v. *Railroad Company*, 149 U. S. 308. In such cases the writs of error will be dismissed.

The facts as to the settlement and payment appear here in the record, although they may be shown by other evidence, as the above cases hold.

It is urged that the plaintiff Bonnifield had no right under the circumstances to make the settlement and to satisfy the judgment to the extent which he did. But this does not answer the objection. As matter of fact he and the defendant had a full settlement, and he did satisfy the judgment at the request of the latter, and both defendants in error now join in a motion to dismiss, predicated upon that settlement and payment, and they both thus ratify the same and acknowledge its sufficiency. The plaintiff in error is in no position to deny the validity of the settlement and payment made at his own re-

quest and by himself, when its sufficiency is acknowledged by the other parties.

Being satisfied that the amount in dispute in this case is less than the amount required by statute to give us jurisdiction, and without expressing any opinion upon the other ground for the motion,

The writ must be dismissed for the want of jurisdiction, and it is so ordered.